COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1988 & 1989

Nova Scotia

Department of Labour

Research Division

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1988 - 1989

Nova Scotia Department of Labour
Research Division

Honourable Leroy J. Legere
Minister

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Deputy Minister

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FOREWORD

This publication is the tenth summary of grievance arbitration decisions produced by the Nova Scotia Department of Labour. Owing to delays in the automation of the provincial arbitration database, the decisions for 1988 and 1989 are published here together; subsequent editions will revert to the customary annual schedule.

The decisions included here are those which have been filed in accordance with amendments to the Trade Union Act, effective May, 1978. On occasion, summaries of arbitrations outside the jurisdiction of the Act have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Trade Union Act, and have been included for general interest.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not always get filed with this Department. Results of appealed decisions are received on an ad hoc basis and are included in this publication accordingly.

Part I of the publication is divided into two sections: section A contains decision abstracts for 1988, section B those for 1989. Unlike previous years, the indices contained in Parts II through IV pertain only to the decisions for 1988 and 1989. Indexing standards for arbitration awards follow Canadian Labour Arbitration by D.J.M. Brown and D.M. Beatty (Agincourt: Canadian Law Book Co., 3rd edition, 1991).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Arbitration decisions under the Trade Union Act are now abstracted and indexed on a computerized database using InMagic software. The Department may provide copies of the database upon special arrangement. Please address all inquiries relating to printed and machine-readable formats to:

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COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1988 - 1989

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Part 1A

GRIEVANCE ARBITRATION DECISIONS

1988

DECISION: 88-001

Enheat Inc. AND United Steelworkers of America, Local 6874

MacLellan, J.A. - Arbitrator

Cal Leudee, for the Union
Peter McLellan, for the Employer

January 4, 1988

ISSUES: Remedies - Types of remedy - Compliance order 2:1450; Skill and ability - Criteria of ability and qualifications - Requirements of the job 6:3100, Aptitude 6:3330; Skill and ability - Arbitral review - Senior employee with required ability 6:3210; Skill and ability - Trial, training, and familiarization periods 6:3230.

CIRCUMSTANCES: The Grievor, a senior employee, hoped to transfer to a stores job with better working conditons. The Employer preferred to keep him in a production job, to balance green hands. The Employer stated that neither he nor other candidates had the ability to perform the stores job immediately. When a junior employee was reassigned and trained for the job, the grievance was laid.

AWARD: The grievance succeeds, and the employer is ordered to offer the grievor the position. The Employer is found to have acted in good faith.

DECISION: 88-002

Enheat Inc. AND United Steelworkers of America, Local 4883

MacLellan, J.A. - Arbitrator

Cal Leudee, for the Union
Peter McLellan, for the Employer

January 4, 1988

ISSUES: Interpretation - Reasonableness 4:2100; Job classifications and descriptions - Creation or revision - Collective agreement limitations 5:2200; Fairness - Job posting 5:2300; Good faith - Vacancies, transfers, promotions 5:2300; Skill and ability - Criteria of ability and qualifications - Requirements of the job 6:3100, Aptitude 6:3330; Skill and ability - Arbitral review - Senior employee if relatively equal 6:3220; Skill and ability - Trial, training, and familiarization periods 6:3230; Seniority - Applications - Promotion, Demotion and Transfer 6:2100.

CIRCUMSTANCES: An apprentice with two months' seniority was transferred and promoted to Millwright. He held a Millwright journeyman's certificate, though apprenticed in another type of work. The Grievor, with 13 years' seniority as a Fitter, cited a contract clause that "apprentices in a given trade or craft or assigned maintenance jobs shall not apply for any other position until they have completed their apprenticeship course".

AWARD: The grievance fails. The contract requires that a senior employee meet "the minimum requirements of the job". The Employer acted reasonably and fairly in selecting the qualified junior employee.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd) edition, 203.

DECISION: 88-003

Sydport Offshore Services AND Canadian Brotherhood of Railway, Transport and General Workers

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Donald Rowe, for the Employer

January 5, 1988

ISSUES: Good faith - Vacancies, transfers,promotions 5:2300; Skill and ability - Criteria of ability and qualifications - Requirements of the job 6:3100, Aptitude 6:3330; Skill and ability - Arbitral review - Senior employee if relatively equal 6:3220.

CIRCUMSTANCES: A stevedore with 29 years' seniority was passed over for a job he had previously held. Employer records showed that he had been removed from this job five years ago for cause. He had not grieved then, and was similarly employed since, only in an emergency.

AWARD: The grievance fails. The Grievor's record shows he has less ability in the job, and the collective agreement asserts management's right to decide who is qualified.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration 226, 231, 263, 295, 297, 299, 301.

DECISION: 88-004

Moosehead Breweries Ltd. AND Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 361

Outhouse,Bruce - Arbitrator

Raymond Larkin, for the Union
Brian Johnston, for the Employer

January 7, 1988

ISSUES: Interpretation - Earlier interpretation of same provision 1:3000; Interpretation - Aids to interpretation - Prior awards and court decisions 4:2220; Bargaining unit - All employee unit 5:1100; Bargaining unit - Employees excluded 5:1120; Interpretation - Words and phrases - Employees 5:1122.

CIRCUMSTANCES: The Employer refuses to consider new employees as part of the bargaining unit, claiming that they are in the "salesmen and public relations" category, exempted by the collective agreement. The union argues that the "sales" job function should be interpreted according to the intention of the parties at the time the clause was inserted, when there were only a few area sales representatives.

AWARD: The grievance fails. The Employer bears the burden of proof, but its argument for a broad definition of "sales" functions is accepted. The Union is free to attempt to sign up the new employees and apply to the Labour Relations Board.

AUTHORITIES: Re Hortin CBI, Ltd., and United Steelworkers, Local 8473 (1982), 4 L.A.C. (3d) 97, 100, 101 (Adell). Re Rubber Workers, Local 424 and Firestone Tire and Rubber Company Limited (1956), 6 L.A.C. 293 (Taylor). Re Perley Hospital and Canadian Union of Public Employees, Local 870 (1984), 16 L.A.C. (3d) 421 (Roach). Re Hydro Electric Power Commission of Ontario and Canadian Union of Public Employees, Local 1000 (1974), 5 L.A.C. (2d) 168 (O'Shea). Dist'd:. Re Board of Directors of Halifax Infirmary Hospital and Nova Scotia Nurses' Union, Halifax Infirmary Local (1982), 6 L.A.C. (3d) 357 (Outhouse). Re Highland Beverages Limited and United Brewery Workers (1984), 13 L.A.C. (3d) (Weatherill). Re Perth County Board of Education and Federation of Women Teachers' Associations of Ontario and Ontario Public School Men Teachers' Federation (1977), 14 L.A.C. (2d) 128 (Brandt). International Brotherhood of Electrical Workers, Local 2345 et al v. Noranda Metal Industries Limited, Fergus Division (1983), 84 C.L.L.C. 12,093 (Ont. C.A.). Re Motor Transport Industrial Relations Bureau of Ontario and Teamsters Union, Locals 91, 141, 879, 880, 938 (1973), 4 L.A.C. 2d) 89 (Brown). Re International Chemical Workers, Local 552 and Emery Industries (Canada) Limited (1970), 21 L.A.C. 163 (Weatherill). Re United Automobile Workers, Local 673, and Douglas Aircraft

Company of Canada Ltd. (1970), 22 L.A.C. 50 (Brown). Re Perley Hospital and Canadian Union of Public Employees, Local 870 (1984), 16 L.A.C. (3d) 413 (Roach).

DECISION: 88-005

Pictou District School Board AND Canadian Union of Public Employees, Local 867

Outhouse, Bruce - Chair; Hennick, Kenneth; Rankin, Gary

Susan Coen, for the Union
Bruce MacIntosh, for the Employer

January 22, 1988

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310, 7:3312, 7:3314; Disciplinary penalties - Mitigating factors - Employment record - Dishonesty 7:3314; Disciplinary penalties - Mitigating factors - Rehabilitative potential 7:4422.

CIRCUMSTANCES: A janitor admitted to police that upon being denied overtime pay, he had taken home, refinished, and tried to sell a school sewing machine. He later altered his story but was convicted. The school board suspended and fired him. The Union grieved, that he had been unjustly dismissed for "careless borrowing."

AWARD: The grievance fails under the weight of police evidence, grievor's lack of candour, and violation of a position of trust. No mitigating factors were found.

AUTHORITIES: Re Langley Memorial Hospital and Hospital Employees' Union, Local 180 (1985), 18 L.A.C. (3d) 123 (Thompson). Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258 (1984), 17 L.A.C. (3d) 113 (Thompson). Re MacMillan Bloedel Ltd., Alberni Pulp and Paper Division and Canadian Paperworkers Union, Local 592 (1983), 12 L.A.C. (3d) 82 (Morrison). Re Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union (1984), 13 L.A.C. (3d) 315 (Brown). Re Association of Commercial and Technical Employees, Local no. 1670 and the Nova Scotia Liquor Commission (September 20, 1984) unreported (Outhouse). Re Canadian Union of Public Employees, Local 759 and the City of Sydney Works Department (April 2, 1985), unreported (Gillis). Palmer, Collective Bargaining in Canada (2nd ed.) pp. 367, 358. Dist'd: Re Nova Scotia Forest Industries and Canadian Paperworks Union, Local 972 (April 23, 1985) unreported, (MacLellan). Re Association of Commercial and Technical Employees, Local 1670 and Nova Scotia Liquor Commission (May 16, 1986), unreported (Outhouse). Re Teamsters, Chauffeurs, Warehousemen, Local 927 and Producers Milk Products (March 16, 1982) unreported (MacLellan). Brown and Beatty, Canadian Labour Arbitration (2nd ed.), pp. 482-497.

DECISION: 88-006

International Brotherhood of Electrical Workers, Local 1030 and International Brotherhood of Electrical Workers AND Office and Professional Employees International Union

Ruck, Douglas G. - Arbitrator

Simon Berlin, for the Union
Brian Johnston, for the Employer

January 18, 1988

ISSUES: Jurisdiction - Sources - Collective agreement 2:1200; Collective agreement - Essentials 4:1100; Bargaining unit - Definition 5:1100, Employees excluded 5:1120; Severance pay 8:3800; Union - Recognition 9:1100; Arbitrability - Statutory requirement 2:1100.

CIRCUMSTANCES: The Grievor's employment was terminated by the Employer and the Grievor seeks four (4) weeks severance pay. The Employer claims that the Grievor is not part of a certified bargaining agent, thereby making the collective agreement inapplicable. The Employer further states that it is not an "employer" as defined by the Trade Union Act, because there is only one employee, and the Act calls for more than one employee. Therefore the Arbitrator has no jurisdiction.

AWARD: The grievance fails. The Arbitrator finds that the Union had not acquired certification since the filing of an Agreement does not constitute voluntary recognition. The Grievor was the only employee, and as such no unit of employees existed in accordance with the Act. The provisions of the Act do not apply; therefore the Arbitrator has no jurisdiction.

AUTHORITIES: International Brotherhood ofElectrical Workers, Local 1852 AND Sterisystems Ltd., L.R.B. No. 324C. International Brotherhood of Electrical Workers, Local 625 AND Murray Nowe Electric. L.B.R. No. 552C. Trade Union Act, S.N.S. 1972, c. 19, Section 1 Subsection (1) (x), Subsection 1 (a), (b) (c), (e) (i), (l), Subsection 2(28), Section 2 Subsection 28 (1), (b).

DECISION: 88-007

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Chair; North, Greg; Hebert, Norm

Thomas Pittman, for the Union
Jonathan Davies, for the Employer

January 8, 1988

ISSUES: Interpretation 4:2100; Wages -Compliance with the wage structure 5:2400; Job classifications and descriptions - Creation or revision - Change of work load/job function 5:2410; Wages - Rates for new and revised classifications 8:1000.

CIRCUMSTANCES: The Grievors argue they were not being paid properly for their work classification. The Arbitrator is asked to determine proper classification. The language of the collective agreement is being tested for ambiguities in regard to the words, "hired, employee and operator."

AWARD: The grievance succeeds. The Grievors did not lose their employment status when they were reclassified.

DISSENT: (North) Grievances should be dismissed. The Employer has distinquished between the terms "employees" and "operators". The three (3) Grievors were not employed as "Operators" prior to January 1, 1986 and were therefore not entitled to benefits.

AUTHORITIES: Concise Oxford Dictionary of Current English (1982). Canadian Concise Desk Dictionary (1983). Websters New Collegiate Dictionary (1977). Himmelman (1986) (Veniot). Trade Union Act. Arbitration Act.

DECISION: 88-008

Truro (Town) AND Truro Fire Fighters Assn., Local 1627

MacLellan, J.A. - Chair; Grant, Denis; Durnford, Eric

Raymond Larkin, for the Union
David Gruchy and Faisal Jospeh, for the Employer

January 27, 1988

ISSUES: Collective agreement - Company rules 4:1500; Management rights 4:2300

CIRCUMSTANCES: The Grievor was hired as a Driver/Operator prior to moving outside the town. The Employer argued the move violated its residence requirement, and thus the Grievor should be discharged if he does not move back within the city. The Union questions the Employer's reasonableness in applying the residency rule, and asserts the Grievor's right to choose his place of residence.

AWARD: The grievance fails. The Employer may discharge the Grievor by application of the residency rule. However, the Board recommends the Town make an effort to make the rule more reasonable in its application.

DECISION: 88-009

Canso Sea Products Ltd. AND United Food & Commercial Workers' International Union, Local 1252

Veniot, Milton J. - Arbitrator

Susan Coen, for the Union
R. Camille Cameron and John MacL. Rogers, for the Employer

January 13, 1988

ISSUES: Seniority - Acquisition - Non-Working periods 6:1110, - Termination of seniority 6:1200; Discipline and discharge - Grounds for - Criminal charges 7:3010, - Criminal convictions 7:3422, - Absence from work - Reasonable excuse 7:3112.

CIRCUMSTANCES: The Grievor claims he was wrongfully dismissed following his sentencing to five (5) months in jail. The Grievor neglected to inform the Employer of the situation; at the time of the sentencing, he was off work because of an on the job injury for which he was receiving Worker's Compensation. The Employer terminated the Grievor's employment on the grounds that he would not be available for work for the time of the sentence. The Employer also claims that the Grievor's conduct and conviction created a safety problem at work.

AWARD: The grievance succeeds. The Employer's decision to discharge is found too severe a penalty. The Grievor's request to be reinstated with no loss in seniority is not granted. However, the Grievor shall be reinstated with no provision with respect to wages.

AUTHORITIES: Alcan Canada Products AND United Steel Workers, 6 L.A.C. (2d) 386 at p. 394. Western Welding Supplies, Division of Liquid Carbonic Inc. AND Marine Workers and Boilermakers' Industrial Union, Local 1 (1982) 3 L.A.C. (3d) 1.

DECISION: 88-010

Marks & Spencer Canada Inc. (Peoples Division) AND Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 596

MacDougall, R. Lorne - Arbitrator

John B. (Bernie) Campbell, for the Union
Carl LaRoche, for the Employer

January 25, 1988

ISSUES: Estoppel 2:2220; Time-Limits - Continuing grievance 2:3128; Grievance procedure - Waiver of irregularities 2:3130.

CIRCUMSTANCES: The Grievors allege that terms of the collective agreement were violated in regard to scheduling practices. The Employer raised the preliminary objection to the jurisdiction of the Arbitrator to hear and make award with respect to the timeliness of the issue. The Employer requests withdrawal of the grievances due to violation of time limitations by the Union.

AWARD: The grievances are withdrawn. It is found that the Union was properly put on notice by the Employer regarding procedural requirements.

DECISION: 88-010. A

Marks & Spencer Canada Inc. (Peoples Division) AND Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 596

MacDougall, R. Lorne - Arbitrator

John B. (Bernie) Campbell, for the Union
Carl LaRoche, for the Employer

February 18, 1988

ISSUES: Management rights - Schedules 5:3100; Seniority - Acquisition 6:1100; Working hours and shifts - Reduction of hours 6:2210.

CIRCUMSTANCES: The Grievors claim the collective agreement was violated when the Employer scheduled certain senior employees to come to work earlier than less senior employees. They argue that scheduling in the past had been on the basis of seniority. The new schedule brings in part-time employees to work over senior full-time employees, thereby causing a loss in hours for full-time employees. The Employer claims all full-time employees still retained thirty-five (35) hours per week and the collective agreement does not state scheduling should be done on the basis of seniority. Employers claim the new schedule was made for business reasons.

AWARD: The Grievors' claims fail. The collective agreement did not specifically state that scheduling be done in light of seniority and business reasons were seen by the Arbitrator as being valid ones for the change.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada, (2d) pp. 606-8.

DECISION: 88-011

Westpoint Metals AND Sheet Metal Workers' International Assn., Local 409

Kydd, William H. - Arbitrator

Ronald A. Pink, for the Union
William Thomas, for the Employer

January 29, 1988

ISSUES: Remedies - Type of grievance - Union security - Damages 2:1426; Evidence - Burden of proof - Damages 3:2412; Evidence - Types of evidence - Business records 3:3100, 3:4320; Work assignment - Contracting out- Employees outside unit 5:1400.

CIRCUMSTANCES: The Union grieves that a contractor violated the collective agreement by not paying dues for 14 men. The contractor showed that it paid some of the money six months later, and argued that several employees were outside the bargaining unit.

AWARD: The grievance succeeds. The Employer must pay the balance of dues owing.

DECISION: 88-012

A.R. Hemming Building Systems Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 2165

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
David Bright, for the Employer

February 1, 1988

ISSUES: Evidence - Circumstantial evidence 3:5100; Ancillary documents 4:1200; Discipline and discharge - Grounds for - Theft 7:3310, 7:3312, - Evidence - Final incident 7:4312; Disciplinary penalties - Culminating incident - Theft 7:3314.

CIRCUMSTANCES: The Grievor was dismissed for two causes: repeated absenteeism and implication in workplace thefts. The collective agreement specified dismissal as a penalty for theft. The Union argued there was a lack of documentation of absenteeism, that the agreement only specified a maximum penalty for theft, and that the evidence of theft was circumstantial.

AWARD: The grievance fails. The balance of probabilities is that Grievor was involved in theft; his previous record contains no mitigating factors. Discharge is the appropriate penalty specified in the agreement.

AUTHORITIES: Trade Union Act, S.N.S. 1972 c.19as am. Re Toronto East General Hospital Inc. and Service Employees' International Union (1975) 9 L.A.C. (2d) 311 (Beatty). Re Dominion Stores Ltd. and Toronto Warehousemen and Retail, Wholesale and Department Store Union, Local 414 (1981) 3 L.A.C. 3d) 91 (MacLaren).

DECISION: 88-013

Glace Bay General Hospital AND Nova Scotia Nurses' Union

MacLellan, J.A. - Chair; D'Orsay, John; MacDougall, Donald H.

Jan Silliker, for the Union
Brian Johnson, for the Employer

February 3, 1988

ISSUES: Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430; Company rules 4:1500; Discipline and discharge - Grounds for - Abuse of leave of absence 7:3120; Evidence - Burden of proof - Applications -Illness 7:3250 - Qualifying for benefits 8:3320.

CIRCUMSTANCES: The Grievor was refused sickpay. The Employer claimed she had not communicated the fact of her illness to her supervisor. An incomplete form led to denial of pay. The Employer was also concerned about general employee abuse of sick leave.

AWARD: The grievance succeeds, with back pay awarded. The Board was satisfied by managers' and co-workers' evidence of illness. There was no bad faith by Employer, or abuse by employee, who bears the onus to report illness at the time it occurs. The Employer should state and enforce its sick leave policy more clearly.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada, 699.

DECISION: 88-014

Extendicare Health Services Inc. (Spring Garden Villa) AND Canadian Union of Public Employees, Local 1183

O'Connell, Charles - Chair; MacNeil, Kevin; Boudreau, Bernard

James Crosby, for the Union
Judith Clarkson, for the Employer

February 2, 1988

ISSUES: Interpretation - Reasonableness 4:2100; Fairness - Job posting 5:2300; Good faith - Vacancies, transfers, promotions 5:2300; Skill and ability - Criteria of ability and qualifications - Aptitude 6:3300, - Requirements of the job 6:3100,- Arbitral review - Senior employee with required ability 6:3210,- Trial, training, and familiarization periods 6:3230.

CIRCUMSTANCES: A senior employee grieved that she had not won a position as Typist/Receptionist, for which she had training and experience. The Employer had offered her the chance to perform the typing test on two separate occasions, and offered the tests as evidence.

AWARD: The grievance fails. It is management's right to set tests of ability to perform a job. Grievor's test results show she did not qualify.

DISSENT: Kevin MacNeil

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984), 308, 311. Mt. Sinai Hospital and Ontario Nurses' Association, unpublished January 15, 1985 (Teplitsky). Re Gabriel of Canada Ltd. and International Association of Machinists, Local 1295 (1978) 20 L.A.C. (2d) 168 (Kates).

DECISION: 88-015

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Bruce P. Archibald - Arbitrator

Kim Turner, for the Union
Jonathan Davies, for the Employer

February 9, 1988

ISSUES: Remedies - Type of grievance -Discharge or suspension 2:1421; Evidence - Burden of proof - Applications - Discipline 3:2411, 3:2500, 7:2300 ; Grievance procedure - Discipline procedures 7:2100; Discipline and discharge - Grounds for - Alcoholic beverages 7:3560, - Warning - Warning as discipline 7:4210.

CIRCUMSTANCES: On the grounds that she "had liquor on her breath", the Grievor was sent home, by a supervisor at the Detox Centre. The Union concurred that a no-alcohol policy was essential, but showed that the alcometer registered falsely to Rothman's cigarette smoke, which was the Grievor's brand. The Employer argued that she had been found unfit for work, not disciplined.

AWARD: The grievance succeeds, and back pay awarded. The action was disciplinary; the Employer's reprimand letter is confirming but not crucial evidence. The supervisor acted in good faith, but should have repeated the test 10 minutes later to eliminate false readings. The reprimand letter must be removed from the Grievor's employment record.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) 467-468. Earl Edward Palmer, Collective Agreement Arbitration in Canada (2nd ed.) Butterworths, Toronto, 1983 at 248-249, with Supplement (1986) 43. Re Denison Mines (1983) 12 L.A.C. (3d) 364 (Adams). Milton District Hospital (1980) 26 L.A.C. (2d) 20 (Brandt).

DECISION: 88-016

Ron May Pontiac Buick GMC Ltd. AND Canadian Brotherhood of Railway Transport and General Workers, Local 506

MacDougall, R. Lorne - Arbitrator

Victor Tomiczek, for the Union
Michael Kuna, for the Employer

February 8, 1988

ISSUES: Vacation 8:3210, - Computation of vacation and vacation pay 8:3230 - Period of service 8:3220.

CIRCUMSTANCES: The Grievor, recently returned from lay-off, alleges that the Employer has violated the provisions of the collective agreement in calculating his entitlement to vacation pay. In calculating vacation pay, the Employer considers employees as new employees when returning to work after lay-off. The Union takes the position that vacations are earned in terms of length of service. The Employer maintains that lay-off is regarded as severance and the Grievor is only entitled to 6% of gross earnings.

AWARD: The grievance succeeds. No indication was found linking "service" to a defined activity or number of hours. The Grievor was considered as an employee within the terms of the collective agreement and was subject to being called back to work by the Employer so that there was never a complete severance of the employee relationship. The Employer shall pay the difference owed to the Grievor.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) pp. 587-8. Re Air Canada and Canadian Airline Employees' Association (1976) 13 L.A.C. (2d) 225. Re Union Gas Ltd. and Oil, Chemical & Atomic Workers' International Union, Local 9-758 (1980) 27 L.A.C. (2d) 72. Re Sola Basic Ltd. and International Association of Machinists, Local Lodge 1168 (1976) 11 L.A.C. (2d) 328.

DECISION: 88-017

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Cromwell, T.A. - Arbitrator

R.A. Pink, for the Union
W. Wilson, for the Employer

January 22, 1988

ISSUES: Discipline and discharge - Evidence - Burden of proof 7:2300, - Warning - Failure to warn 7:4416; Disciplinary penalties - Reasonableness 7:4300, - Culminating incident 7:4310, - Mitigating factors - Compassion 4:4427.

CIRCUMSTANCES: The Grievor was dismissed by letter, following complaints that the Grievor had sexually harassed a co-worker. The issue to be decided is whether or not there is just cause for dismissal.

AWARD: The grievance succeeds. The original penalty of discharge is replaced by a six (6) month suspension. The Grievor is found not dangerous, his improper touching not being sexual in nature, and the comments he made not being obscene or threatening. The Grievor's past clear record was taken into consideration.

AUTHORITIES: P.E. Darby and C. Lace, April 22,1986. Brown and Beatty, Canadian Labour Arbitration, 2d, 1984, p. 329. Government of the Province of Alberta and the Alberta Union of Provincial Employees (1982) 5 L.A.C. (3d) 268. Himmelman v. King's Edgehill School (1985) 67 N.S.R. (2d) 358 (T.D.). North York General Hospital and the Canadian Union of General Employees (1973) 5 L.A.C. (2d) 45. Etobicoke General Hospital and Ontario Nurses' Association (1977) 15 L.A.C. (2d) 172. Civil Service Bargaining Act, s. 38(4).

DECISION: 88-018

Mersey Electrical and Mechanical Contracting Ltd. AND United Assn. of Journeymen & Apprentices of the Plumbing, Steamfitting & Pipefitting Industry of the United States & Canada, Local 56

MacNeil, Elwin J. - Arbitrator

Raymond F. Larkin, for the Union
David J. Bright, for the Employer

February 26, 1988

ISSUES: Interpretation 4:2000 - Intentions of the parties 4:2100.

CIRCUMSTANCES: The parties disagree on the interpretation of the collective agreement with respect to types of work covered by the agreement. The Union contends that the agreement is limited to "domestic and commercial plumbing" and does not relate in any way to industrial plumbing. The Employer contends that the agreement has a broad enough definition to include industrial work.

AWARD: The work being carried out is governed by the collective agreement. The agreement is not intended to exclude "industrial plumbing", but rather to include "domestic and commercial work" within the collective agreement. Authority is retained "to determine if there has been any breach of the terms of the collective agreement".

DECISION: 88-019

Adam Clark Co. Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 1178

Kydd, William H. - Arbitrator

Ronald Pink, for the Union
Peter McLellan, for the Employer

February 29, 1988

ISSUES: Discipline and discharge - Grounds for- Alcoholism 7:3210.

CIRCUMSTANCES: Upon the commencement of the hearing, both parties stated they had come to an agreement regarding the grievance.

AWARD: The Grievor shall be hired by the Employer upon referral, provided that the Grievor has completed the 28 day alcohol and drug dependency program sponsored by the Nova Scotia Commission on Drug Dependency. After employment, the Grievor will be discharged if an alcoholic relapse takes place on the job site. The Grievor must continue to receive outpatient counselling through the Nova Scotia Commission on Drug Dependency, and is to refrain from the use of alcohol or non-prescription drugs.

AUTHORITIES: Trade Union Act (NovaScotia) Section 103(4).

DECISION: 88-020

Acadian Lines Ltd. AND International Union of Operating Engineers, Local 721

MacLellan, J.A. - Arbitrator

Gordon Forsyth, for the Union
Peter McLellan, for the Employer

March 4, 1988

ISSUES: Probationary employee - Lay-Off 6:2352; Recall - Probationary employee 7:5000.

CIRCUMSTANCES: A grievance was filed alleging that the Employer failed to recall the Grievor in accordance with his rights as set out in the collective agreement. The Employer's position is that the Grievor was discharged during his probationary period, therefore the collective agreement has not been violated.

AWARD: The grievance fails. It was found that the Grievor was initially discharged, and not laid-off.

AUTHORITIES: International Association of Firefighters Local 268 v. City of Halifax, 1982, 50 NSR (2d) 300. Re Toronto Hydro-Electric and CUPE (1980), 29 O.R. (2d) 18.

DECISION: 88-021

St. Rita's Hospital AND Nova Scotia Nurses' Union

Darby, Peter E. - Chair; Larkin, Raymond F.; McDougall, Donald H.

Terry L. Roane, for the Union
Laurie Sayer-Smith, for the Employer

March 4, 1988

ISSUES: Discipline and discharge - Company rules 4:1500.

CIRCUMSTANCES: The Employer requires that all nurses provide proof of registration prior to the calendar year of registration. The Grievors were unable to provide the proof of registration in the required time, and after being given notice, were not permitted to work until they provided the proof of registration. They argue that this action contravenes the collective agreement and that not enough notice was given, and therefore request compensation for lost hours. The Employer maintains that demanding annual proof of registration is within its rights, and the suspension was justified.

AWARD: The Grievance succeeds and the Employer must compensate the Grievors for lost hours. It was found that the rule regarding proof of registration was not binding on the Union and was unreasonable.

DISSENT: (D.H. McDougall) The grievance succeeds; however, there is dissent with the conclusions of the committee. It was felt that the rule regarding proof of registration was not unreasonable.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (2nd ed.) p. 177 et seq., Re Lumber and Sawmill Workers Union v KVP Co. Ltd. (1965), 16 L.A.C. 73. The Nova Scotia Nurses' Union and Dartmouth General Hospital and Community Health Care (1984 unrep. Darby). The Halifax Infirmary Local of the Nova Scotia Nurses' Union v The Halifax Infirmary Hospital (SCA No. 00989-1982, Registered Nurses' Association Act, 1985 (SNS 1985, C.5).

DECISION: 88-022

Nova Scotia Power Corp. AND International Brotherhood of Electrical Workers, Local No. 1928

Outhouse, Bruce - Arbitrator

Raymond Larkin, for the Union
Terry Roane, for the Employer

March 8, 1988

ISSUES: Work assignment - Contracting out - Improper assignment within unit 5:2000; Seniority - Shift assignment 6:2000; Vacation - Scheduling vacations 8:3240.

CIRCUMSTANCES: The Union alleges that the Employer violated the rules governing vacation scheduling in the collective agreement by not giving preference to senior employees. The Employer claims that the employee section in question had been divided into three groups, and therefore seniority should be determined within each group. This division brought about the grievance. The definition of what a "working group" is must be dealt with by the arbitrator.

AWARD: The grievance succeeds. The terms "working group" and "section" were deemed to have the same meaning and therefore seniority in regard to vacation scheduling should be determined by taking the three working groups as a whole. The change in the number of working groups was therefore not seen by the arbitrator as being relevant.

DECISION: 88-023

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Chair; North, Gregory I.; Whitehead, Sandra

Susan Coen, for the Union
Jonathan Davies, for the Employer

March 8, 1988

ISSUES: Work Assignment - Contracting Out - Improper Assignment Within Unit 5:2000, - Vacancy 5:2510 ; Job Posting 5:2520.

CIRCUMSTANCES: An Employee left the bargaining unit and became a regular foreman. The Union argues that the service truck position in question is a "certified" position and therefore has to be posted. The Employer contends that it is the employees, not the positions, that are certified, and therefore there was never a vacancy to be posted.

AWARD: The grievance fails. There was no vacancy since there were a number of qualified operators, permitting the assignment of an operator to the task without the necessity of posting.

AUTHORITIES: Himmelman, Supra, Tidewater Oil Company (Canada) Ltd. (1963), 14 L.A.C., Brown and Beatty, p. 240, United Brewery Workers, Local 802, Loblaw Grocerterias Co. Limited (1967) 18 L.A.C., 420, Disabled and Aged Regional Transit System and C.U.P.E., Local 839 (1985), 20 L.A.C. 355, Corporation of the City of Victoria and C.U.P.E., Local 50 (1982), 2. L.A.C. 368 (Brown), Fraser, Gibbs and McNeil. I.B.E.W. Local 1928 and Nova Scotia Power Corporation (Outhouse), (Oct. 27, 1980),

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DECISION: 88-024

Halifax (City) AND Canadian Union of Public Employees, Local 143

Outhouse, Bruce - Arbitrator

Kimberley Turner, for the Union
Gerald Goneau and Barry Allen, for the Employer

March 18, 1988

ISSUES: Employee - Temporary, casual and part-time 5:1124; Discipline and discharge - Burden of proof 7:2300, - Grounds for - Work performance - Culpable incompetence 7:3510, Probationers - Unsuitability 7:3530, - Warning - Failure to warn 7:4416 .

CIRCUMSTANCES: The Grievor alleges that he was a permanent employee and was discharged by the Employer without just cause or due warning. The Grievor requests that he be reinstated to his former position with full compensation. The Employer alleges that the Grievor was a probationary employee and he was properly dismissed for unsatisfactory performance. The Employer further states that even if the Grievor were a permanent employee, he would have been dismissed due to substandard work performance.

AWARD: The grievance succeeds. The Grievor is reinstated to his former position with full compensation, the principle of mitigation applying. The Grievor was found to have completed the probationary period well before his dismissal.

AUTHORITIES: Maple Leaf Monarch Co. and Windsor Grain Processors Union, Local 1 (1984), 13 L.A.C. (93d) 307 (Gorsky). City of Halifax and International Association of Firefighters, Local 268 (1982), 6 L.A.C. (3d) 240 (Outhouse). Municipality of Ottawa-Carleton and Canadian Union of Public Employees, Local 503 (1981), 4 L.A.C. (3d) 77 (Swan). Corporation of the City of Ottawa and Canadian Union of Public Employees, Local 503 (1984), 13 L.A.C. (3d) 293 (Little). McGavin Toastmaster Ltd. v. Ainscough et al (1975), 54 D.L.R. (3d) 1. Wajax Industries Ltd. and International Union of Operating Engineers, Local 115 (1980), 26 L.A.C. (2d) 154 (Getz). Board of Governors of the Riverdale Hospital and Canadian Union of Public Employees, Local 79 (1983), 11 L.A.C. (3d) 267 (Brandt). Western Marine Ltd. and Teamsters Union, Local 351 (1983), 12 L.A.C. (3d) 260 (Albertini). North York General Hospital and Canadian Union of General Employees (1973), 5 L.A.C. (2d) 45 (Shime). Canron Ltd. and International Assoc. of Bridge, Structural & Ornamental Iron Workers, Shopmens' Local 743 (1973), 2 L.A.C. (2d) 273 (Brown).

DECISION: 88-025

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, W. Brent - Arbitrator

Kim Turner, for the Union
William Wilson, for the Employer

March 3, 1988

ISSUES: Evidence - Burden of proof 3:2400; Skill and ability - Burden of proof 3:2413; Work assignment - Vacancy 5:2510; Job posting 5:2520; Seniority - Applications - Promotion, demotion and transfer 6:2100; Skill and ability 6:3000, - Arbitral review 6:3100, - Senior employee with required ability 6:3210, - Criteria of ability and qualifications - Education 6:3320.

CIRCUMSTANCES: The Grievor was unsuccessful in his application for promotion. The Grievor claims he was of at least equal merit and also senior to the successful candidate. The Grievor claims the Employer had conducted the selection process in an unfair manner and asks that the position be awarded to the Grievor or the Employer repost the position and conduct a new competition. The Employer claims to have conducted the selection process in a reasonable and appropriate manner, and the process did not have to be perfect in order to be fair and reasonable.

AWARD: The grievance fails. The onus is on the Union to provide proof of unfair procedures on the part of the Employer. Sufficient proof was not found. The candidates were not of equal merit, and the successful candidate was more qualified for the position than the Grievor

AUTHORITIES: Nova Scotia Government Employees Union and Civil Service Commission of the Government of Nova Scotia (unreported, September 24, 1984, Outhouse). Carling Breweries Ltd. (1968), 19 L.A.C. 110. Canadian Labour Arbitration, (2nd ed. 1984). Nova Scotia Government Employees Association and Civil Service Commission of the Province of Nova Scotia (unreported, August 12, 1981, Langille). Nova Scotia Government Employees Union and Civil Service Commission of the Province of Nova Scotia (Unreported, October 5, 1981, Outhouse).

DECISION: 88-026

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, W. Brent - Arbitrator

Kim Turner, for the Union
Jonathan Davies, for the Employer

April 14, 1988

ISSUES: Discipline and discharge - Grounds for 7:3000, - Refusal to obey instructions - Health and safety 7:3621; Disciplinary penalties 7:4000, - Union officials 7:4320; Union - Activity and business 9:1400, - Officials 9:1500, - Discipline - Standard 9:1530.

CIRCUMSTANCES: The Grievor made a personal, written complaint to the Employer concerning smoking in the work place. He believed that the Employer's reply contained a reprimand for his having made a complaint. The Grievor alleges the Employer interfered with his union duties, discriminated against him for union activities, and failed to fulfill health and safety responsibilities. The Employer argues that its reply to the Grievor was personal, not union related, and therefore the onus is on the Grievor to prove harassment.

AWARD: The grievance regarding the Employer's failure to address health and safety concerns fails; no adequate proof was presented that the Grievor's health was at risk. The Grievance regarding Employer harassment fails. The section of the Employer's reply to the Grievor that was thought to constitute a reprimand was found to be unjustified, but not anti-union.

AUTHORITIES: International Woodworkers of America v. G.W. Martin Lumber Limited (1980) O.L.R.B.R. 738 p. 741. Bell and Korczak (1080), 27 L.A.C. (2d) 227 (Shime). Canadian Union of Public Employees and Professional Employees' International Union, Local 491 (1982), 4 L.A.C. (3d) 384 (Swinton). Canada Post and Canadian Union of Postal Workers (1983), 11 L.A.C. (3d) 13 (Norman). Canadian National Railways Co. v. Shinder and the Canadian Human Rights Commission (1986), 64 N.R. 185. Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpson-Sears Ltd., (1986), 64 N.R. 161. Canadian Labour Arbitration (1985) p. 489-90. Devibiss (Canada) Ltd., (1975) O.L.R.B. Rep. Sept. 678. Canadian Labour Law p. 490. Occupational Health and Safety Act. Trade Union Act, S.N.S. 1972, c. 19 ss. 51 and 53-56. Civil Service Collective Bargaining Act, S.N.S. 1978, c. 3 ss. 41-43.

DECISION: 88-027

Able Equipment Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

MacLellan, J.A. - Arbitrator

Gordon Forsyth, for the Union
Clifford Dahms, for the Employer

April 14, 1988

ISSUES: Union - Security - Check off 9:1200; Work assignment - Contracting out - Employees outside unit - Remedies 5:1500.

CIRCUMSTANCES: The Union alleges that the Employer violated the collective agreement by hiring three carpenters who were not union members. The Union alleges that the employer did not inform the Union that the required men had not been sent as originally requested. The Union demands compensation for wages lost due to payment to non-union members. The Employer maintains that they were unaware that the men hired were non-union.

AWARD: The grievance succeeds. However, the amount requested by the Union is reduced on the basis that the employer made an innocent mistake and in no way tried to deliberately deceive the Union. The Employer will pay the Union in trust for the men who were not employed, within 30 days.

AUTHORITIES: Blouin Drywall Contractors Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 2486, 1975, 57 D.L.R. (3d) p. 199.

DECISION: 88-028

Canexel Hardboard Inc. AND Canadian Paperworkers' Union, Local 434

MacLellan, J.A. - Arbitrator

Dennis Grant, for the Union
Gregory I. North, for the Employer

April 15, 1988

ISSUES: Discipline and discharge - Grounds for - Insolent behaviour or obscene language 7:3660; Disciplinary penalties - Nature of disciplinary sanction 7:4210, - Reasonableness 7:4300, - Mitigating factors 7:4400, Provocation 7:4412, Employment record 7:4428.

CIRCUMSTANCES: The Grievor was suspended for three days without pay for threatening and intimidating the Employer by using obscene language during an emergency situation. The Union questions whether there was cause for discipline. If the Employer did have cause for discipline, was the three day suspension fair and equitable under the circumstances.

AWARD: The grievance succeeds in part. The Grievor's suspension is reduced to one day. Evidence indicated that the emergency caused the Grievor to lose his temper and to overreact toward his Employer. However, obscene language cannot be tolerated in the workplace. The Grievor was also seen to have had a negative attitude toward his job and supervisors. The Arbitrator was satisfied that the Grievor can and will change his attitude.

DECISION: 88-029

Canadian Linen Supply Co. Ltd. AND Retail, Wholesale & Department Store Union, Local 1015

MacLellan, J.A. - Arbitrator

Roseanne Skoke, for the Union
Karin McCaskill, John Rogers, for the Employer

April 15, 1988

ISSUES: Discipline and discharge - Grounds for - Sabotage 7:3410, - Burden of proof 7:2300; Evidence - Standard of proof 3:2500; Remedies - Types of remedy - Reinstatement 2:1470.

CIRCUMSTANCES: The Employer dismissed the Grievor due to testimony from a fellow employee that she had been seen sabotaging a load of wash. The Employer argued that this was considered an act of theft against the company. The Grievor requests reimbursement without loss of benefits and wages and reinstatement in her job.

AWARD: The grievance succeeds. The Arbitrator was not satisfied that the Employer had discharged the obligation of burden of proof that is required. The civil standard of balance of probability was used, and the Employer did not discharge the burden properly.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd) p. 133. Miller v. Minister of Pensions [1947] 2 ALL E.R. 372 (K.B.) p. 374.

DECISION: 88-030

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Archibald, Bruce P. - Chair; Bell, J.K.; North, Gregory I.

Susan Coen, for the Union
Jonathan Davies, for the Employer

April 11, 1988

ISSUES: Management rights - Company rules 4:1500; Discipline and discharge - Grounds for - Theft 7:3310; Disciplinary penalties - Reasonableness 7:4300, - Mitigating factors - Rehabilitative potential 7:4422.

CIRCUMSTANCES: The Grievor claims he was improperly dismissed and seeks reinstatement and compensation. The grounds for dismissal were that the Grievor had stolen property belonging to the Employer. The Grievor admitted to the theft, but added the material stolen could be termed as "scrap" and was in his opinion of little value to the Employer. The Grievor was charged and convicted in court of theft of under $1000.00.

AWARD: The grievance succeeds in part. The discharge was seen as unjust and was replaced with a six month suspension. The Grievor was to be reinstated without loss of seniority rights. Any lost wages should be compensated for. There was seen to be a lack of uniformity in the Employer's workplace in regard to which materials are genuine waste and which are not. The stolen material in question was seen to have little value and the Grievor's good work record was taken into account, as well as his potential for rehabilitation.

AUTHORITIES: R. v. Pace, [1965] 3 C.C.C. 55; Canadian Labour Arbitration, Canadian Law Book, Aurora, 1984, at p. 387; Weiser Inc. and Canadian Association of Industrial, Mechanical, and Allied Workers, Local 20 (1986) 23 L.A.C. (3d) 331 at p. 334 (Greyell); Phillips Cables Ltd. and the International Union of Electrical, Radio and Machine Workers, Local 510 (1974) 6 L.A.C. (2d) 35 at p. 37; Frito-Lay Canada Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers, and Allied Employees, Local 647 (1975) 10 L.A.C. (2d) 234 (Beatty); R. v. Smith (1987) 58 C.R. (3d) 193 (S.C.C.); Earl E. Palmer, Collective Agreement Arbitration in Canada (2nd ed.) Butterworths, Toronto (1983) at p. 248; Brown and Beatty, pp. 488-9; United Electrical Workers and Canadian General Electric Co. Ltd. (1958) 8 L.A.C. 238 (Little); Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1973) 4 L.A.C. (2d) 148 (Palmer); Nova Scotia Liquor Commission Employees' Union, Local 470, CLC (1974) 5 L.A.C. (2e) 117; Coast Canadian Inn and British Columbia Government Employees' Union (1986) 26 L.A.C. (3d) 97 (Bluman); Brown and Beatty, p. 497; Steel

Equipment Co. Ltd. (1964) 14 L.A.C. 356 (Reville); Canadian Union of Public Employees, Local 2336 and V.G. Services Limited, May 13th, 1983 unreported; Nova Scotia Forest Industries and Canadian Paperworks' Union, Local No. 972, April 18th, 1985, unreported.

DECISION: 88-031

Yarmouth Regional Hospital AND Canadian Union of Public Employees, Local 835

Veniot, Milton J. - Chair; North, Gregory I.; D'Entremont, Delbert

Diane Bourque, for the Union
Laurie Sayer-Smith, for the Employer

April 25, 1988

ISSUES: Discipline and discharge - Just cause 7:1200; Innocent absenteeism 7:3210.

CIRCUMSTANCES: The Grievor claims wrongful dismissal and asks for reinstatement. The Grievor had been dismissed previously for innocent absenteeism, but was reinstated under arbitration. The Employer alleges that the terms of her return to work agreement have been breached, justifying a second dismissal.

AWARD: The grievance succeeds. The Grievor is reinstated with no loss in seniority or benefits, but no compensation is allowed. The terms of the original reinstatement were seen to be unclear in regard to conditions of reinstatement in regard to absenteeism.

AUTHORITIES: Nova Scotia Government Employees' Union and Civil Service Commission, (Feb. 17, 1979), unreported - Clarke. United Automobile Workers and Massey Ferguson Limited (1970) 20 L.A.C. 370 at p. 371. Atlas Steels Co. and Canadian Steel Workers' Union, Atlas Division (1975) 8 L.A.C. (2d) 350 (Westerill). Falconbridge Nickel Mines Ltd. and Sudbury Mine Mill and Smelter Workers' Union, Local 598 (1978) 18 L.A.C. (2d) 293. Crocies-Hinds Canada Ltd. and United Automobile Workers (1981) 3 L.A.C. (3d) 230 (Brown).

DECISION: 88-032

Nova Scotia College of Art and Design AND Nova Scotia College of Art and Design Faculty Union

McDougall, R. Lorne - Chair; Diego, Anne; McDougall, Donald H.

John D'Orsay, for the Union
Eric Durnford, for the Employer

March 31, 1988

ISSUES: Management rights - Job standard 4:2310; Wages - Equal pay for equal work 8:1100.

CIRCUMSTANCES: The Grievors claim they are entitled to receive the stipend they qualified for as department heads. They argue that their duties are equivalent to those of other staff designated department heads, and therefore they should receive the stipend in question. The Employer claims this is an issue of contract interpretation and that the Grievors were never in the position of department heads and therefore not entitled to any stipend.

AWARD: The grievance fails. The Agreement is silent on the creation of department heads, so management has the authority to perform this function. The question of equal work is not relevant since the Grievors were never classified as department heads.

DISSENT: (Diego) April 24, 1988: The grievance of two of the three Grievors should succeed. The two Grievors are seen as carrying out duties of a department head, and therefore are entitled to receive the stipend in accordance with the collective agreement.

AUTHORITIES: Sudbury Mine, Mill & Smelter Workers' Union and Falconbridge Nickel Mines Ltd. (1969) 20 L.A.C. 45 (P.C. Weiler). Dominion Stores Ltd. and Retail, Wholesale & Department Store Union (1976) 13 L.A.C. 433 (W.B. Rayner). Regional Municipality of Waterloo (Sunnyside Home) and London and District Service Workers' Union, Local 220 (1978) 20 L.A.C. (2d) 77 (R.J. Roberts) p. 82. Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, (1984) 13 L.A.C. (3d) 248 (K.P. Swan) p. 258. Governors of Acadia University and International Union of Operating Engineers, Local 968B, (unreported) 1983 (S.B. Outhouse). Municipality of Metropolitan Toronto and Toronto Civic Employees' Union, Local 43 et al (1975) 62 D.L.R. (3d) 53. Hawker Siddely Canada Inc. Trenton Works Division and United Hawker Siddely Canada Inc. Trenton Works Division and United Steelworkers of America, Local 1237, (1983) 150 D.L.R. (3d) 509. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UA), Local 720 and Volvo Canada Ltd., 1977 18 N.S.R. (2d) 592. Outboard

Marine Corporation of Canada Ltd. and United Steel Workers, Local 5009, (1982) 4 L.A.C. (2d) 185 (E.E. Palmer, Q.C.). United Automobile Workers and Massey Ferguson Ltd. (1960) 11 L.A.C. 33 (W.S. Lane), pp. 37-8. Nova Scotia Nurses' Union, Highland View Regional Hospital and Highland View Hospital, June 21, 1984 (unreported), p. 2/3. Governors of Acadia University and International Union of Operating Engineers, Local 968B 66 N.S.R. (2d) 296 (1985).

DECISION: 88-033

Dartmouth Senior Care Society, Operators of Oakwood Terrace AND Canadian Union of Public Employees, Local 2774

Outhouse, S. Bruce - Arbitrator

A.K. Cunningham, for the Union
W.C. Clarke, for the Employer

April 29, 1988

ISSUES: Management rights - Job standard 4:2310; Wages 8:1000; Probationary employee 7:5000.

CIRCUMSTANCES: The Grievor claims the Employer violated the collective agreement by paying the starting salary rate for the first six months in the position she was promoted to. The Grievor asks to be paid at the top of her scale immediately without a probationary period, claiming the wage schedule in the collective agreement is ambiguous because it contains two pay rates for each classification but does not clearly spell out under what circumstances the rates apply. The Grievor further states the six month probationary period should only apply to new employees, not promotions. The Employer states the collective agreement is merely silent on the application of the starting rate.

AWARD: The grievance succeeds. The present employee wage schedule had been accidentally omitted from the collective agreement and it states the starting salary rate only applied to probationary employees, not promoted employees.

AUTHORITIES: Hoover Co. Ltd. and United Electrical, Radio and Machine Workers, Local 520 (1982) 7 L.A.C. (3d) 157. Alcan Canada Products Ltd. and Metal Foil Workers' Union, Local 1663 (1982) 5 L.A.C. (3d) 1 (Arthurs). Ethyl Canada Inc. and Energy & Chemical Workers' Union, Local 300 (1987) 26 L.A.C. (3d) 201 (Devlin). Canadian Union of Public Employees, Local 1280 and Metropolitan Separate School Board (March 1, 1986) unreported (Teplitsky). McGavin Toastmaster Ltd. v.

Ainscought et al, (1975) 54 D.L.R. (3d) 1, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 4 N.R. 618.

DECISION: 88-034

Antigonish District School Board AND Canadian Union of Public Employees, Local 1524

Evans, L.K. - Chair; MacIntosh, Bruce; Hennick, Ken

Alex Sommerville, for the Union
A.G. MacDonald, for the Employer

April 13, 1988

ISSUES: Discipline and discharge - Grounds for - Attitude 7:3660; Disciplinary penalties - Nature of disciplinary sanction 7:4210; Management rights - Company rules 4:1500.

CIRCUMSTANCES: The Grievor claims a letter of discipline from the Employer is unjust. The Grievor, upon being told to go back to work by the Employer, shouted at him, using abusive language.

AWARD: The grievance fails. The evidence indicates that the Employer did not lose his temper and was not abusive toward the Grievor. The discipline was seen as being appropriate. However, the Employer is instructed to improve communications regarding changes in its disciplinary policy.

DISSENT: (Hennick) The Grievor is seen as having been provoked by the Employer.

DECISION: 88-035

C. MacDonald Electric AND International Brotherhood of Electrical Workers, Local 625

Kydd, William H. - Arbitrator

unknown, for the Union
unknown, for the Employer

April 27, 1988

ISSUES: Benefits - Alteration of gratuitous benefits 8:1400; Collective agreement - Form and content - Pension, insurance and welfare plans 4:1400.

CIRCUMSTANCES: The arbitration was settled by telephone and concerned a union claim for arrears on unpaid benefit plan contributions.

AWARD: The parties reached settlement. The Employer will pay the Union the arrears owing for nonpayment of benefit plan contributions to the Union Trust Fund, according to the collective agreement.

DECISION: 88-036

Braemore Home AND Canadian Union of Public Employees, Local 753

Outhouse, Bruce - Arbitrator

Gerald Yetman, for the Union
David MacKillop, for the Employer

May 5, 1988

ISSUES: Discipline and discharge - Grounds for - Reasonable excuse 7:3112; Illness or disability - Sick leave 7:4210; Insurance and welfare plans - Entitlement to benefits 8:3320.

CIRCUMSTANCES: The Grievor demands payment for sick leave. The Employer claims the Grievor's work performance had diminished just before the sick leave began and doubted the legitimacy of the Grievor's illness. The Grievor provided letters from medical practitioners testifying as to the nature of his illness. The Employer demanded a second opinion from a psychiatrist.

AWARD: The grievance succeeds. The Grievor was found to be legitimately ill during the period in question. The Employer did not have the right to insist on getting a pyschiatric opinion. The collective agreement has a provision for sick leave that requires only one proof of illness from a medical practitioner.

AUTHORITIES: Canadian Labour Arbitration (2nd ed.) pp. 177-83, 380-81, 596-98, 601-605. Halifax Infirmary Local of the Nova Scotia Nurses' Union and the Halifax Infirmary Hospital (December 31, 1982), unreported (S.C.A. No. 00989). Nova Scotia Association of Health Organizations (Dartmouth General Hospital) and the Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606 (July 7, 1980), unreported (Outhouse). Eastern Provincial Airways (1963) Ltd. and International Association of Machinists and Aerospace Workers, Local 1763 (1981) 29 L.A.C. (2d) 306 (Bruce). St. Joseph's Hospital and United Nurses of Alberta (1987) 28 L.A.C. (3d) (Bonak). Re Oil, Chemical & Atomic Workers, Local 9-593, and BP Oil Ltd. (1972) 24 L.A.C. 122 (Palmer). Thompson and Town of Oakville (1963) 41 D.L.R. (2d) 294 (Ont. High Ct.). Air Canada and Canadian Airline Employees' Association (1982) 8 L.A.C. (3d) 82 (Simmons). Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (1978) 20 L.A.C. (2d) 419 (M.G. Picher). Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (1978) supra. Canada Post Corporation and Canadian Union of Postal Workers (Seaton, Bennett, Rickets) (1986) 23 L.A.C. (3d) 18 (P.C. Picher). Canadian Labour Arbitration (2nd ed.) pp. 610-3. Women's Christian Association of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Local 220 (1983) 10 L.A.C. (3d) 336 (Brown). St. Lawrence Lodge and Ontario Nurses' Association (1985) 21 L.A.C. (3d) 65 (Emrich). Ontario Hydro and Ontario Hydro Employees' Union, CUP Local 1000 (August 22, 1984) unreported (Swan). Eastern Provincial Airways (1963) Ltd. and International Association of Machinists, Aerospace Workers, Lodge 1763 (1981), supra. Nova Scotia Association of Health Organizations (Dartmouth General Hospital) and the Canadian Brotherhood of Railway, Transport and General Workers, Local 606 (1980) supra.

DECISION: 88-037

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Cromwell, T.A. - Chair; D'Orsay, J.; Durnford, E.

R.A. Pink, for the Union
A. Scott, for the Employer

March 26, 1988

ISSUES: Res Judicata 1:3000; Decisions of other boards of arbitration - Applications - Issue estoppel 2:3220.

CIRCUMSTANCES: Two years prior to filing the present grievance, the Grievor had a grievance dealing with the same issue dismissed. The Grievor claimed two factors had combined to create a new case: first, a new clause in the collective agreement had created new conditions of entitlement to leave with pay, the issue in dispute; second, the Workers' Compensation Appeal Board allowed the Grievor's appeal from an earlier decision of the Board.

AWARD: The grievance fails. The new section of the collective agreement which succeeded the one in force at the time of the first grievance shows that the parties intended the change in entitlement to be prospective in operation. Thus, there is no new issue which this Grievor is entitled to present for adjudication.

DISSENT: (D'Orsay) The grievance succeeds. The application of the relevant article in the prior award involves the determination of different questions from the application of the relevant article in this grievance, which was added to the agreement. Therefore, the question cannot be considered res judicata.

AUTHORITIES: Re Manitoba Food and Commercial Workers' Union, Local 832 and Canada Safeway (1981), 120 D.L.R. (3d) 42, Monnin, J.A. Re Toronto Transit Commission and Amalgamated Transit Union, Local 113 (1985) 21 L.A.C. (3d) 346. Re Eastern Provincial Airways Ltd. and International Association of Machinists and Aerospace Workers (1984) 13 L.A.C. (3d) 129. Bower, Spenser, Turner, The Doctrine of Res Judicata. New Brunswick Rail Co. v. British and French Trust Corporation Ltd. (139) A.C. 1, H.L. Re Bestview Holdings, 1 L.A.C. (3d) 218. Re University of Ottawa and Association of Professors of the University of Ottawa, 22 L.A.C. (2nd) 192. Re Arnprior and District Memorial Hospital and Ontario Nurses Association, 4 L.A.C. (3d) 444.

DECISION: 88-038

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Outhouse, Bruce - Arbitrator

Kimberley Turner, for the Union
Jonathan Davies, for the Employer

April 14, 1988

ISSUES: Estoppel 2:2200, 2:2210; Management rights - Job standard 4:2310; Time-Limits - Mandatory or directory 2:3128; Wages - Compliance with wage structure 5:2400.

CIRCUMSTANCES: The Grievor alleges the collective agreement was violated when she was requested to perform the duties of a higher classification for three years without proper pay or classification. The redress requested is acting pay or pay at the proper classification, retroactive for the full three years. The Grievor claims she was told by the Employer that retroactive pay would begin from the date of her application. The Employer claims no such promise was made.

AWARD: The grievance fails. The Grievor was never expressly told that she would receive retroactive pay. The Employer said nothing to the Grievor which was sufficiently positive in nature to form the basis of an estoppel.

AUTHORITIES: N.S.G.E.U. AND C.S.C. (October 30, 1986), unreported (Outhouse). N.S.G.E.U. AND C.S.C. (January 15, 1986), unreported (Outhouse). N.S.G.E.U. AND C.S.C. (January 29, 1987) unreported (Outhouse). N.S.G.E.U. AND C.S.C. (February 2, 1987), unreported (Outhouse). Canada Packers Ltd. and Canadian Food & Allied Workers, Local P1105 (1976) 11 L.A.C. (2d) 370 (Weatherill). N.S.G.E.U. AND C.S.C. (July 13, 1987), unreported (Outhouse).

DECISION: 88-039

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Jonathan Davies, for the Employer

April 15, 1988

ISSUES: Overtime - Distribution of overtime 5:3220; Interpretation - Intention of the parties 4:2100 .

CIRCUMSTANCES: To cut overtime costs, the Employer started to offer overtime to casual employees if there were no regular employees available. The Union claimed that once a casual employee had worked forty hours in a calendar week, any further assignment of work to that employee constituted overtime within the meaning of the collective agreement and, thus, had first to be offered to the regular collectors.

AWARD: The grievance fails. "Overtime" is defined in the collective agreement in such a way that it refers exclusively to work performed by the bargaining unit. Therefore, the provision requiring overtime to be allocated on a "fair and equitable" basis does not apply to casual employees.

AUTHORITIES: Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill and Smelter Workers' Union, Local 598 (1981), Brown and Beatty.

DECISION: 88-040

Scotsburn Co-operative Services Ltd. AND Retail, Wholesale Dairy Workers' Local 198

MacDonald, David J. - Chair; MacNeil, Kevin; Khattar, G.S.

Tom Pickford, for the Union
J.C. Leefe, for the Employer

April 20, 1988

ISSUES: Management rights - Contracting out 4:2300; Work assignment - Contracting out 5:1300.

CIRCUMSTANCES: An independent jobber had his route taken over by another independent jobber. The Grievor claimed that the route should have been taken over by the company and serviced by bargaining unit members, according to a Letter of Agreement.

AWARD: The grievance fails. As the situation did not result in an increase in the number of jobbers, nor an increase in contracting out of work, there has been no breach of the agreement.

AUTHORITIES: Re: Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelter and Allied Workers, Local 1, 28 L.A.C. (3d). Brown & Beatty, Canadian Labour Arbitration (2nd ed.) p. 215.

DECISION: 88-041

Pictou District School Board AND Canadian Union of Public Employees, Local 867

Khattar, Thomas J. - Chair; MacMillan, Donald B.; Lynn, John K.

Susan D. Coen, for the Union
Bruce T. MacIntosh, for the Employer

May 4, 1988

ISSUES: Discipline and discharge - Just cause 7:1200; Disciplinary penalties - Culminating incident 7:4310, - Mitigating factors - Failure to warn 7:4416, - Types of penalties - Warning 7:3542; Procedure - Powers of board of arbitration - Taking a view 3:3300; Subpoena - Power to issue 3:3210; Good faith - Discriminatory discipline 7:4414.

CIRCUMSTANCES: There are two grievances. In the first, the Grievor was given a letter of reprimand for driving his school bus too fast. The Grievor claimed that a letter of petition from parents should be excluded from the evidence because its contents were not made known to him; that he was not given the opportunity to have a shop steward present at the meeting between the Grievor and his Employer; and that, by failing to communicate a standard of performance to the Grievor, the Employer has not established just cause. In the second grievance, the grievor was suspended for two days without pay for driving in a dangerous manner. The grievor claimed that the employer's report of his driving conduct contained errors of fact which were prejudicial, and that the employer was attempting to discriminate against part-time drivers, like himself, who had other jobs. Finally, the grievor claimed he was not given union representation at a disciplinary meeting.

AWARD: The first grievance succeeds. A conveyance of general intent by the Employer is not sufficient warning to the Grievor that he may be disciplined. In accordance with the collective agreement, the letter of petition must be excluded from the evidence, as the Grievor was not appraised of its contents. The Grievor was entitled to be notified in advance of the meeting with his Employer, so as to obtain the participation of his Steward, as the meeting was a disciplinary one. The letter of reprimand, the memos, and the petition are to be removed from the Grievor's file. The second grievance succeeds. Not affording union representation to the grievor at the disciplinary meeting amounted to a breach of the collective agreement by the employer. The errors of fact were not prejudicial to the grievor, and the employer was not guilty of discriminatory discipline; however, the breach of the collective agreement entitles the grievor to be paid at his normal rate for the two days of his suspension.

AUTHORITIES: Carlan Enterprises Limited and International Union of Capital Operating Engineers, Local 955 (1985) 20 L.A.C. (3d). Motor Vehicle Act, R.S.N.S., 1967, c 191. Motor Carrier Act, R.S.N.S., 1967, c. 190. Weatherhill, J.E.W., A Practical Guide to Labour Arbitration Procedure (1st ed.). Brown and Beatty, Canadian Labour Arbitration Procedure (2nd ed.). Toronto East General Orthopaedic Hospital Inc. and Ontario Public Service Employees' Union, Local 576, 21 L.A.C. (2d), p. 296. Re Etobicoke General Hospital and Ontario Nurses' Association, 15 L.A.C (2d), p. 172 (Brandt). The Bud Automotive Company and U.A.W. Local 1451 (1972), Lab. Arb. News, April, 1972 (Brown). Re Labatts Ontario Breweries and National Brewery Workers' Union, Local 1, 5 L.A.C. (3d) p. 32 (McLaren). Local 508 of the Amalgamated Transit Union and Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax (1985) unreported (Darby). Re Corporation of the City of Brampton and Amalgamated Transit Union, Local 1573, 19 L.A.C. (2d) p 237 (Shime). The Canadian Union of Public Employees, Local 1218 AND Shelburne District Municipal School Board (1983, unreported) (Christie).

DECISION: 88-042

Farmers Co-operative Dairy Ltd. AND Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927

Outhouse, Bruce - Arbitrator

William Lemon, for the Union
John Crook, for the Employer

May 16, 1988

ISSUES: Discipline and discharge - Just cause, 7:1200, - Grounds for - Refusal to obey instructions - Health and safety 7:3621, - Work performance - Carelessness, 7:3510, 7:3520; Disciplinary penalties - Culminating incident, 7:4310.

CIRCUMSTANCES: The Grievor was discharged following several incidents of carelessness which threatened safety. The Grievor claims that the incidents were minor and that, since inexperience was a factor, discharge was inappropriate.

AWARD: The grievance fails. The Grievor was guilty of very careless work performance. Having regard to the Grievor's prior disciplinary record and relatively brief period of employment, dismissal was an appropriate response.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2nd ed.) pp. 281-3. Re Oshawa General Hospital and Ontario Nurses' Association (1976) 12 L.A.C. (2d) 182 (O'Shea). Re Corporation of the City of Brampton and Amalgamated Transit Union, Local 1573 (1978) 19 L.A.C. (2d) 237 (Shime). Brown and Beatty, Canadian Labour Arbitration (2nd ed.) pp. 416-17.

DECISION: 88-043

Bergengren Credit Union Ltd. AND Union of Bank Employees

MacLellan, J.A. - Arbitrator

Everett Baker, for the Union
Eric Durnford, for the Employer

June 2, 1988

ISSUES: Statutory holidays - Qualifying days - Vacation or leave of absence 8:3125.

CIRCUMSTANCES: The Grievor did not work on the qualifying working day after the Christmas holiday because of a snowstorm. The Grievor failed to obtain permission to be off duty, relying on a fellow worker to notify management of her absence. The Employer claimed that the Grievor was not entitled to holiday pay.

AWARD: The grievance fails. The Grievor did not receive or request permission to be absent from work. The Grievor may have felt that she did all that was necessary, but she was wrong.

DECISION: 88-044

Dalhousie University AND Dalhousie Staff Assn.

MacLellan, J.A. - Chair; Singler, Laraine; McDougall, Donald

Ronald Pink, for the Union
Eric Durnford, for the Employer

June 3, 1988

ISSUES: Evidence - Admissibility - Relevance 3:4200, - Types of evidence - Expert evidence 3:4600; Pregnancy - Leave - Vacation pay 8:3250, - Medical benefits 8:3320.

CIRCUMSTANCES: The Grievor claims she was unjustly denied sick leave pay and forced by the Employer to begin maternity leave six weeks ahead of schedule. The Grievor argues that she was absent from work because of illness, and the fact that she happened to be pregnant at the same time was irrelevant. The Employer claims that if the Grievor had not been pregnant she could have continued working. The Employer stated that the pregnancy materially affected her work, and they were therefore justified in placing the Grievor on early maternity leave.

AWARD: The grievance succeeds. The Arbitrators applied the balance of probabilities and concluded the Grievor's bedrest was ordered as a result of her illness, thus entitling her to sick benefits under the collective agreement. The Grievor is entitled to sick leave and maternity leave, and vacation entitlement used by the Grievor should be returned to her.

DISSENT: (McDougall) The grievance fails. The Grievor has failed to discharge the onus of proof which all Grievors bear in non-disciplinary arbitration since there was doubt as to the cause of the illness in question.

DECISION: 88-045

Braemore Co-operative Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

MacLellan, J.A. - Arbitrator

Roseann M. Skoke, for the Union
Douglas Caldwell, for the Employer

December 16, 1987

ISSUES: Res Judicata - Criminal proceedings 1:4100.

CIRCUMSTANCES: The Grievor, a cashier, was acquitted of theft under the Criminal Code, but was later discharged by the Employer because of numerous irregularities that had been found in her cash. The Grievor argued that under the Canadian Charter of Rights and Freedoms an arbitrator cannot decide a case where the acts which are said to constitute just cause have already been dealt with by the Criminal courts.

AWARD: The arbitrator has jurisdiction. Case law favours the Employer's position in saying that there has not been an infringement of a fundamental right in such situations.

AUTHORITIES: Canadian Charter of Rights and Freedoms, s. 11 (h). Retail, Wholesale and Department Store Union, Local 58 et al v. Dolphin Delivery Ltd. (1986) 33 D.L.R. (4th) 174 (S.C.C.). Regina v. Wigglesworth (1984) 7 D.L.R. (4th) (Sask. C.A.). Re Trumbley et al and Fleming et al, (1986) 29 D.L.R. (4th) 557 (Ont. C.A.). Re Pelissero and Loree (1982) 140 D.L.R. (3d) 676 (Ont. Div. Ct.). Re Bridges et al and Halton Regional Police Force (January 6, 1984), Judge Colter. Re Macdonald and Marriott et al (1984) 7 D.L.R. (4th) 697, 52 B.C.L.R. 346 (B.C.S.C.).

DECISION: 88-046

Braemore Co-operative Ltd. AND Retail, Wholesale and Department Store Union

MacLellan, J.A. - Arbitrator

Roseann Skoke, for the Union
Douglas Caldwell, for the Employer

June 7, 1988

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310.

CIRCUMSTANCES: The Grievor, a cashier, was discharged for "serious irregularities" in her cash. The Grievor had just previously been found not guilty of theft at a trial over the same incidents.

AWARD: The grievance succeeds in part. The Grievor had been extremely negligent, although not guilty of theft. There are grounds for severe discipline, but not discharge. Therefore, because the relationship between the two parties is broken beyond repair, the Employer is ordered to pay the Grievor a lump sum payment equal to one month's pay, to serve as severance pay in lieu of notice.

DECISION: 88-047

Ben's Ltd. AND Bakery, Confectionery and Tobacco Workers' International Union, Local 446

MacLellan, J.A. - Chair; Clarke, Rick; Durnford, Eric

Rene Quigley, for the Union
Karin McCaskill, for the Employer

June 6, 1988

ISSUES: Job classifications and descriptions - Creation or revision - Collective agreement limitations 5:2200, Change of work load/job function 5:2410.

CIRCUMSTANCES: The Grievor, a journeyman mechanic, was re-classified by the Employer to the lower position of apprentice. The Grievor claims that the collective agreement only permits the Employer to advance the employee in a re-classification, and that, since he was still doing the work of a journeyman mechanic, he should be paid as such.

AWARD: The grievance fails. The Employer acted within the terms of the collective agreement.

DISSENT: (Clarke) The grievance succeeds. The Grievor's work assignments varied little, if any, after his "demotion". In addition, if the Employer legitimately had too many mechanics in place, the normal procedure would have been to lay off the Grievor, and not reduce his wage by demoting him.

DECISION: 88-048

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada

Kydd, William H. - Arbitrator

Gordon Forsyth, for the Union
Brian Johnston, for the Employer

May 31, 1988

ISSUES: Time-Limits - Mandatory or directory, 2:3128; Arbitrability - Agreement as primary source of jurisdiction 2:1200; Discipline and discharge - Grounds for - Work performance - Carelessness 7:3520, - Just cause 7:1200.

CIRCUMSTANCES: The Grievor, an experienced crane operator, was suspended without pay for three days following an accident in which his crane was damaged. The Grievor claimed that the disciplinary measure was not carried out within the time-limits of the collective agreement, and that there was not just cause for a suspension. The Employer claimed that the time-limits were not part of the collective agreement, that the offence was not of a minor nature, and that, even if the time-limits were part of the collective agreement, there was very little delay.

AWARD: The grievance fails. Considering all of the circumstances, there was no injustice in allowing the grievance to proceed, even though the time-limits were part of the agreement and that the Employer went slightly beyond the limits. The Grievor's mistake amounted to negligence, and the Employer's discipline was justified.

AUTHORITIES: Re Lumber and Sawmill Workers' Union, Local 2537 and K.V.P. Co., Ltd. (1965) 16 L.A.C. 73. Re United Electrical Workers', Local 524 and Canadian General Electric Co., Ltd. (1951) 2 L.A.C. 688. Brown and Beatty, Canadian Labour Arbitration, (2d) 177. Re Inmont Canada Limited and Energy and Chemical Workers' Union, Local 25 (1981) 30 L.A.C. (2d) 436. Re C.I.P. Containers Limited and International Chemical Workers', Local 229 (1973) 2 L.A.C. (2d). Budd Automotive Company and U.A.W., Local 1551; Re Eastern Provincial Airways (1963) Limited and Canadian Airline Employees Association (1980) 26 L.A.C. (2d). Re Dominion Consolidated Truck Lines Limited and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 141 (1975) 60 D.L.R. (3d) 37. Re Mirador Motor Inn and Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (1973) 2 L.A.C. (2d) 339. Re McKellar General Hospital and Ontario Nurses' Association (1986) 24 L.A.C. (3d) 97. Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1981) 124 D.L.R. (3d) 684. The United Steelworkers of America and International Nickel Company of Canada Ltd. (1968) 19 L.A.C. 118 (Weatherill, Gillis and Healy). Port Arthur Shipbuilding Co. v. Arthur's

(1968) 70 D.L.R. (2d) 693. Kotch Transport Ltd. v. The Canadian Union of United Brewery, Flour, Cereal and Distillery Workers of America, Local 173, (September 23, 1987) (Barrett Arbitrator). Re Corporation of the Town of Dundas and Canadian Union of Public Employees, Local 1006 (1972) 1 L.A.C. 161. Palmer, Collective Agreement Arbitration in Canada, (2d) 361. Canadian Paperworkers' Union, Local 583, and Minas Basin Pulp and Power Co., Ltd. Re Wheadon (1985) (Outhouse, Yetman and Durnford). Steel Company of Canada Ltd. Hilton Works v. United Steelworkers of America, Local Union 1008 (Jones). Canadian Airline Flight Attendants' Association and Air Canada Re Juhasz (Christie) (1984). Huestis v. The New Brunswick Electric Power Commission (1979) 98 D.L.R. (3d).

DECISION: 88-049

St. Rita Hospital AND Nova Scotia Nurses' Union

Scaravelli, N.M. - Chairman; MacDougall, Donald H.; Larkin, Raymond F.

Jan McK. Siliker, for the Union
Eric Durnford, for the Employer

June 14, 1988

ISSUES: Pyramiding of benefits 8:2140, 8:3330; Extrinsic evidence 3:4400; Overtime - Premiums - Holiday pay 8:3140, 8:3230.

CIRCUMSTANCES: The Grievor, a Registered Nurse, worked overtime during the Victoria Day holiday. The Grievor claimed to be underpaid for her extra hours of work. The Employer claimed that there is no provision for a holiday rate to be used in the calculation of overtime, as the Grievor claimed, and that the Grievor's claim amounts to pyramiding.

AWARD: The grievance fails. Nothing in the agreement supports the Grievor's position that overtime worked on a holiday is to be calcuated by applying the overtime rate against a holiday rate. The Grievor's interpretation would create a windfall, and, unless specified to the contrary, overtime payment must be calculated in accordance with the standard hourly rate.

DISSENT: (Larkin) The grievance is allowed. The agreement requires the Employer to pay the Grievor the same rate of pay for all hours worked on the holiday; it does not allow the Employer to pay holiday pay for only the regular shift worked by the Grievor.

AUTHORITIES: Re Allied Construction Counsel (1961) 12 L.A.C. 105. Re Minnesota Mining and Manufacturing of Canada (1965) 16 L.A.C. 191. Re International Union of Operating Engineers, Local 866 v. Cyanamide Ltd. (1959) 9 L.A.C. 353. Re St. Thomas - Elgin General Hospital v. Ontario Nurses' Association (1984) 17 L.A.C. (3d) 202. Brown & Beatty, Canadian Labour Arbitration (2d) 193. Silverwood Dairies Limited (1969) 20 L.A.C. 406.

DECISION: 88-050

Northwood Care Inc. AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606

Outhouse, Bruce - Arbitrator

Gordon Forsyth, for the Union
Terry Roane, for the Employer

June 21, 1988

ISSUES: Pyramiding of benefits 8:2140, 8:3330; Extrinsic evidence 3:4400; Overtime - Premiums - Holiday pay 8:3140, 8:3230.

CIRCUMSTANCES: The Grievor, a personal care worker at a nursing home, worked her regular eight hours during Labour Day and then eight more hours of overtime. The Grievor claimed that the Employer did not pay the proper amount for working sixteen hours on a statutory holiday, and that the Grievor should be paid 46 times her regular hourly rate. The Employer claimed that the Grievor is entitled to only 34 times the regular hourly rate, that the Grievor's claim amounts to pyramiding. The Grievor claims further that the Employer's practice prior to collective bargaining is extrinsic evidence and, thus, inadmissable as an aid to construction.

AWARD: The grievance succeeds in part. The Grievor is allowed 36 times her straight time rate. Prohibitions against pyramiding, unless otherwise stated, only apply to benefits which are paid for the same or similar purposes.

AUTHORITIES: Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 (1984) 13 L.A.C. (3d) 356 (Picher). Re Labatt's Ontario Breweries and International Union of Operating Engineers, Local 772 (1983) 10 L.A.C. (3d) 29 (Weatherill). Re Borden Chemical Co. (Canada) Ltd. and Allied and Technical Workers, Local 13491 (1973) 3 L.A.C. (2d) 383 (Weatherill). Re City of Brampton and Amalgamated Transit Union, Local 1573 (1980), 25 L.A.C. (2d) 165 (Weatherill). Re Canada Packers Ltd. and Canadian Food and Allied Workers, Local P417 (1974) 9 L.A.C. (2d) 11 (Weatherill). Re St. Thomas - Elgin General Hospital and Ontario

Nurses' Association (1984) 17 L.A.C. (3d) 202 (Burkett). Re International Union of Operating Engineers, Local 866 and Cyanamide Ltd. (1959) 9 L.A.C. 353 (Schwenger). Re Milk and Bread Drivers, Local 647 and Silverwood Dairies Ltd. (1969) 20 L.A.C. 406 (Weatherill). Re Humber Memorial Hospital Association and Canadian Union of Public Employees (1982) 5 L.A.C. (3d) 324 (Kennedy).

DECISION: 88-051

Highland Fisheries Ltd. AND Canadian Brotherhood of Railway, Transport, and General Workers, Local 622

O'Connell,Charles - Arbitrator

Victor Tomiczek, for the Union
Eric Durnford, for the Employer

June 21, 1988

ISSUES: Disciplinary penalties - Reasonableness 7:4300; Skill and ability - Criteria of ability and qualifications 6:3300.

CIRCUMSTANCES: Four Grievors argue that their employment was unjustly terminated and they seek to be reinstated and fully compensated. The Employer justified its action on the grounds that severence was paid to each employee after they were found unqualified for their positions.

AWARD: The grievance succeeds in part. The Employer is ordered to reinstate three of the four Grievors. Two will also be awarded back wages and benefits. The third was allowed to keep the severance pay allotted and will be observed to determine if the Grievor is physically capable of continuing as a trimmer. The case of the fourth Grievor is dismissed for medical reasons, but the board recommended the Employer make an effort to find suitable alternative employment.

AUTHORITIES: Trade Union Act (Nova Scotia)

DECISION: 88-052

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Alison Scott, for the Employer

May 17, 1988

ISSUES: Management rights - Job standard 4:2310; Disciplinary penalties - Mitigating factors - Provocation 7:4412.

CIRCUMSTANCES: The Union argues that the Employer violated the collective agreement's provision that the Employer will notify an employee in writing during a formal performance process if certain aspects of an employee's performance require improvement. The Employer argues that Article 21:03 is not applicable for this situation. The Union requests that the evaluation be removed from the Grievor's file. The supervisor argued that no improvement was required because the Grievor had corrected his behaviour. Therefore written notice was not required.

AWARD: The grievance fails. The conduct of performance evaluation is a management right and the supervisor is free to conduct evaluations as he sees fit. The agreement makes reference to the period between evaluations, not the evaluations themselves.

AUTHORITIES: Civil Service Collective Bargaining Act, S.N.S., 1978.

DECISION: 88-053

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Darby, Peter E. - Arbitrator

Ronald A. Pink, for the Union
Jonathan Davies, for the Employer

June 15, 1988

ISSUES: Collective agreement - Amendments 4:1300; Estoppel 2:2200, 2:2210.

CIRCUMSTANCES: Five Grievors allege that by altering the teaching year, the Employer violated the collective agreement. The changes may require the instructors to work during July and/or August. Vacation time may not be allowed in July or August. The Grievors contend that the agreement is ambiguous and does not allow for a break in the work year. The Employer disagrees, claiming the language of the collective agreement to be unambiguous.

AWARD: The grievances fail on the grounds that the letter written by the Employer regarding vacations and the disputed working days, predates the collective agreement and is therefore invalid.

AUTHORITIES: Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Inc.) et al (1968), 3 D.L.R. (3d) 161, (Ont. H.C.J.). D.J. Brown and D.M. Beatty, Canadian Labour Arbitration, (3rd ed. 1980) pp. 154-5. Brown & Beatty, p. 158. Leitch Gold Mines Case, supra p. 215-6. Leitch Gold Mines Case, supra p. 17. Re Crown in Right of Nova Scotia and Nova Scotia Government Employees' Union (1985) 21 L.A.C. (3d), 35 (Darby). Re Consolidated - Bathurst Inc. Bathurst Division and Canadian Paperworkers' Union, Local 120 (1984), 15 L.A.C. (3d), 423 (Kuttner) at pp. 431-9. Re C.N.R. Co. et al and Beatty et al (1981), 128 D.L.R. (3d) 236 (Ont. Div. Ct.). Re Smoky River Coal Ltd. and U.S.W., Local 761 (1985) 18 D.L.R. (4th) 742 (Alta. C.A.). Nova Scotia Government Employees' supra, p. 82-3.

DECISION: 88-054

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Outhouse, Bruce - Arbitrator

Kimberly Turner, for the Union
William Wilson, for the Employer

June 15, 1988

ISSUES: Job classification and descriptions - Creation or revision - Change of work load/job function 5:2410, - Wage structure 5:2400, 5:2420; Work assignment - Compliance with wage structures 5:2400.

CIRCUMSTANCES: The Grievor argues the collective agreement is clear in its language regarding pay for an "acting" position. The Grievor was acting as a head instructor and claims she should be paid at her regular rate of pay plus 10%. The Employer argues that the rate of pay is based on an additional 4% added onto the Grievor's regular salary. The Employer further argues the collective agreement is clear in its language when it states the maximum rate of the higher-paying position should be equal to what the Grievor would be entitled to if she was permanently in the position. The Employer also claims that experience and qualifications of the individual in the position are taken into consideration.

AWARD: The grievance succeeds. The Employer is directed to compensate the Grievor at her regular rate of pay plus 10%, from the date she began working in the "acting" position. The collective agreement was found to be plain in its meaning regarding the rate of pay for the position in question and makes no allowance for experience or qualifications of individuals.

DECISION: 88-055

Atlantic Provinces Special Education Authority AND Nova Scotia Government Employees' Union

MacLellan, J.A. - Arbitrator

Ronald Pink, for the Union
Eric Durnford, for the Employer

June 27, 1988

ISSUES: Discipline and discharge - Grounds for - Criminal convictions 7:3422, - Off-Duty conduct 7:3010 ; Disciplinary penalties - Mitigating factors - Rehabilitative potential 7:4422; Evidence - Standard of proof 3:2500.

CIRCUMSTANCES: The Grievor claims he was unjustly dismissed and asks for a lesser penalty and therefore reinstatement. The Grievor pleaded guilty in court to a charge of sexual assault and was convicted with a penalty of two years probation and suspended sentence. The Employer argues that the Grievor may be a danger to students at the workplace

AWARD: The grievance fails. The Employer is justified in dismissing the Grievor for his actions outside the workplace when those actions so severely impair his ability to continue his employment in the same environment. The Grievor was seen to be a potential threat to the students at the centre.

DECISION: 88-056

Richmond District School Board AND Union of Public Employees, Local 1069

Outhouse, Bruce - Chair; Hennick, Ken; Wadden, Joe

Richard Fogarty, for the Union
David Samson, for the Employer

June 30, 1988

ISSUES: Disciplinary penalties - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor alleged that the Employer breached the collective agreement regarding a two day suspension for improper handling of a school bus. The Employer argued that all Articles were abided by, noting there was no discrimination lodged against the Grievor and that the Employer followed proper procedures in the suspension. The Grievor argued the Employer did not establish just cause for the suspension.

AWARD: The grievance fails. The Grievor was suspended because of his improper operation of the bus.

AUTHORITIES: Trade Union Act, S.N.S., 1972.

DECISION: 88-057

Nova Scotia (Attorney General) AND Police Assn.of Nova Scotia

MacDougall, R. Lorne - Arbitrator

David Fisher, for the Union
Mary Tyson, for the Employer

July 8, 1988

ISSUES: Disciplinary penalties - Types of penalties - Warning 7:4210, - Culminating incident 7:4310, - Mitigating factors - Employees state of mind 7:4424; Conflicts of interest 7:3330; Evidence - Burden of proof - Applications - Discipline 7:2300.

CIRCUMSTANCES: The Grievor, a certified nursing assistant, alleges that he was discharged without just cause and in violation of the collective agreement for forging the signature of a doctor with, he claims, the doctor's oral permission. The signature in question was on an X-ray requisition form which, according to Employer policy, must be signed by the patient's doctor before an X-ray is done. The Grievor had previously been suspended, for administering a drug without proper authorization. The Employer claims the Grievor had no authority to forge the doctor's signature and the doctor in question denies having given oral permission for the Grievor to do so.

AWARD: The grievance fails. The Grievor was found not to have any authority, express or implied, to sign the doctor's name, and by doing so breached the essential element of trust between employer and employee. The Grievor's actions warranted dismissal.

DECISION: 88-058

Stan's Electric Ltd. AND International Brotherhood of Electrical Workers,
Local 1852

Scaravelli, N.M. - Arbitrator

Bernard Boudreau, for the Union
Greg MacLeod, for the Employer

July 18, 1988

ISSUES: Evidence - Burden of proof - Applications -Discipline 7:2300; Discipline and discharge - Grounds for - Refusal to obey instructions - Union official conducting business 7:3623; Union - Officials 9:1500.

CIRCUMSTANCES: The Grievor claims he was wrongfully dismissed in violation of the collective agreement. The Grievor was appointed Union Job Steward at the site by the business manager at the approval of the company representative and in compliance with the collective agreement. The Grievor did not inform the foreman at the site of his Job Steward status until it was, in his opinion, confirmed by the company representative. The Grievor was informed he was being transferred to another work site. The Grievor did not report to the new work site as instructed by the foreman, and upon reporting to the original work site was given a letter of dismissal on the grounds of insubordination. The Grievor claims he could not be terminated since his position as Job Steward called for any transfer to be approved by the business manager. The Employer claims the Grievor was not properly appointed as Job Steward since the owner of the company was not aware of the appointment. The Employer argues that since the Grievor was not a Job Steward, he could be transferred to another work site and, if he refused the transfer, could be fired for insubordination.

AWARD: The grievance succeeds. The Grievor was found to have been properly appointed as Job Steward, since he was appointed by the business manager and the appointment was approved by the Employer's representative. The transfer of the Grievor to a new work site would have therefore been in violation of the collective agreement. The Grievor's union obligations to his fellow workers to remain at the work site as their representative outweigh any charges of insubordination. The Grievor is awarded wages for that period of time from dismissal to date of conclusion of the job.

DECISION: 88-059

Doug Burns Excavation Contracting Ltd. AND United Mine Workers of America, District 26

O'Connell, Charles - Arbitrator

Tim Chaisson, for the Union
J. Bernard Boudreau, for the Employer

July 19, 1988

ISSUES: Overtime - Distribution of overtime - Seniority 5:3222; Estoppel - Condonation 2:2220.

CIRCUMSTANCES: The Union alleges that proper overtime pay rates were not provided. The Grievor worked over eight hours in a twenty-four hour period and was paid straight time, in violation of the collective agreement. The Employer claimed that the Grievor was estopped from attempting to rely on the collective agreement.

AWARD: The grievance fails. The Grievor is estopped from relying on the agreement, because he was well aware of the Employer's practice of not paying overtime, and had been since 1980.

DECISION: 88-060

Standard Paving Maritime Ltd. AND International Union of Operating Engineers, Local 721

MacLellan, J.A. - Arbitrator

Edgar Doull, for the Union
Eric Durnford, for the Employer

July 22, 1988

ISSUES: Interpretation - 4:2000.

CIRCUMSTANCES: The Grievor argued that the paving work done was in the "industrial and commercial sector", and therefore the Employer must abide by the collective agreement. The Employer argued that the work done was "roadbuilding", and therefore the Employer was excluded.

AWARD: The Grievance fails. The work done amounted to "roadbuilding": the work was of the same kind as had been done for years in other areas which had always been considered to be "roadbuilding".

AUTHORITIES: International Union of Operating Engineers, Local 721 and Municipal Spraying and Contracting Limited (August 1, 1985).

DECISION: 88-061

Riverview Adult Residential Centre AND Canadian Union of Public Employees, Local 2330

Veniot, Milton J. - Arbitrator

Richard Fogarty, for the Union
Brian Johnston, for the Employer

Undated

ISSUES: Illness or disability - Sick leave 7:4210; Leave of absence - Employment status while on 8:3300; Estoppel - Delay in complaining or grieving 2:1412, 2:3210; Past practice - 3:4430.

CIRCUMSTANCES: This case deals with accumulation of sick leave time while the employee is on paid sick leave. The Grievors claimed that there should be no reduction or prorating of accumulating sick leave credits while an employee is on paid sick leave, as the practice is not mentioned in the agreement. The Employer claimed that sick leave credits had to be earned and that they could not be earned by employees on sick leave. Alternatively, the Employer claimed the Grievor was estopped, as the Employer had been carrying on its prorating for eleven years without complaint.

AWARD: The grievance fails. Although employees were still "employed", within the meaning of the relevant provision, while on sick leave, the Grievor is estopped from being awarded a remedy because the Union never objected to the Employer's practice over an 11 year period.

AUTHORITIES: Re City of Trail and International Association of Fire Fighters, Local 941 (1983) 10 L.A.C. (3d) 251, at p. 258. Re Outboard Marine Corporation of Canada Limited and United Steelworkers, Local 5009 (1982) 4 L.A.C. (3d) 185 (Palmer). Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Inc.) et al (1968) 3 D.L.R. (3d) 161 (Ont. H. Ct.). The Canadian Seafood and Allied Workers' Union, Locals 101, 105, 106, 112 and 116 CLC and National Sea Products Limited (June 30, 1987) Board Members: E.D. Durnford and Rick Clark. Re Ellenzweig Bakery and Retail Wholesale and Department Store Union, Local 461 (1984) 13 L.A.C. (3d) 336 (D. MacLaren) at p. 340. Re City of Penticton and Canadian Union of Public Employees, Local 608 (Weiler), (1979) 18 L.A.C. (2d) 307. Re Hawker Siddely Canada Inc. Trenton Works Division and United Steelworkers of America, Local 1237 (1983) 150 D.L.R. (3d) 509 (N.S. Sup. Ct.). Nova Scotia Government Employees' Union v. Nova Scotia Civil Service Commission and Michael B. Sherar (unreported as yet). Re Parking Authority of Toronto and Canadian Union of Public Employees, Local 43 (1974) 5 L.A.C. (2d) 150. CN/CP Telecommunications and Canadian Association of Communications and Allied Workers (1981) 3 L.A.C. (3d) 54.

DECISION: 88-062

Canso Sea Products Ltd. AND United Food and Commercial Workers International Union, Local 1252

Veniot, Milton J. - Arbitrator

Susan Coen, for the Union
David E. Reid, for the Employer

July 28, 1988

ISSUES: Evidence - Types of evidence - Extrinsic evidence 3:4400; Past practice 3:4430; Statutory holidays - Holiday pay and other benefits 8:3140, - Qualifying days - Lay-off 8:3122.

CIRCUMSTANCES: The Grievors were denied holiday pay by the Employer during an extended lay-off. The Employer did not dispute that the term "employee" included a laid-off employee, but argued that such employees were not to be so considered on an indefinite basis. The lay-off lasted from November 1987 to January 1988, and the agreement entitled employees who were sick 60 days or less to receive holiday pay.

AWARD: The grievance succeeds in part. Although the agreement is silent as to laid-off employees, it was not the intention of the parties to create substantial differences in entitlement between people who are sick and people who are laid-off. Therefore, a 60 day limit on holiday pay entitlement to qualified, laid-off employees is set.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (1984), p. 277. Re Northern Electric Co. Ltd. and United Automobile Workers, Local 1535 (1972) 1 L.A.C. (2d) 310 (Weatherill). Leitch Gold Mines et al v. Texas Gulf Sulphur (Inc.) et al, 3 D.L.R. (3d) 161 (Ont. H. Ct.), pp. 215-216. Re Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers, Local 300 (1977) 16 L.A.C. (2d) 422, at p. 424. Re Twin Cities Co-operative Dairy Ltd. and Teamsters Union, Local 927 (1980) 26 L.A.C. (2d) 215 at p. 221. Re Bonavista Cold Storage Co. Ltd. and Fisherman, Food and Allied Workers, Local 349 (1975) 9 L.A.C. (2d) 363 at p. 366 (Woolridge). Re General Truck Drivers' Union, Local 938 and Charlton Transport Limited (1972) 24 L.A.C. 39 (Brown). Re Cement, Lime and Gypsum Workers' Union and Wilson Concrete Products Ltd. (1967) 18 L.A.C. 323 (Arrell).

DECISION: 88-063

Larsen Packers, Division of A.C.A. Co-operative Assn. Ltd. AND United Food and Commercial Workers, Local 1252, Fisherman's Union

MacLellan, J.A. - Arbitrator

Susan Coen, for the Union
John Plowman, for the Employer

August 2, 1988

ISSUES: Bargaining unit - Contracting out of 5:1300; Remedies - Type of grievance - Contracting out 2:1424; Arbitrability - Effect of express limitation in collective agreement 2:1100.

CIRCUMSTANCES: This is a case of alleged contracting out. The Employer used non-bargaining unit workers to construct a fence around a fire pond near its plant. The Grievors claimed that contracting out provisions of the collective agreement were violated.

AWARD: The grievance fails. The agreement states that in order for the matter to be the subject of a grievance, there must be an adverse effect on present employees. As there were no employees on lay-off at the time, and because, if the fencing had been done by bargaining unit employees, it would have been done by the maintenance department on their spare time, there was no such adverse effect.

DECISION: 88-064

Dalhousie University AND Dalhousie Staff Assn.

Cromwell, T.A. - Arbitrator

Ronald Pink, for the Union
Eric B. Durnford, for the Employer

July 12, 1988

ISSUES: Insurance and welfare plans - Calculation of benefits 8:3300, - Medical benefits and other benefits 8:3330.

CIRCUMSTANCES: In April, the Grievor's request for reduction to 50% time effective in September was granted. In June the Grievor became ill and ceased work.

The agreement granted the Grievor sick leave of "full salary" for six months. However, the Employer granted the Grievor only half-salary for the months of September, October and November, claiming that the Grievor would only have been a half-time employee if she had worked those months. The Grievor claims she was entitled to full pay.

AWARD: The grievance fails. The change in the Grievor's status was mutually agreed upon and was initiated by the Grievor. In addition, there is no inconsistency between the change in the employee's status and the provision in the agreement giving rise to sick leave benefits.

AUTHORITIES: Re Herb Fraser and United Steelworkers (1979) 23 L.A.C. (2d) 311. Re United Automobile Workers and DeHavilland Aircraft of Canada Limited (1970) 21 L.A.C. 36. Re National Grocers (1978) 19 L.A.C. (2d) 345. Corporation of the District of Matsqui and General Truck Drivers and Helpers Union, B.C. Ministry of Labour, No. A 254/80.

DECISION: 88-065

Nova Scotia Liquor Commission AND Nova Scotia Government Employees' Union, Local 470

MacLellan, J.A. - Arbitrator

Ronald Pink, for the Union
Peter McLellan, for the Employer

August 10, 1988

ISSUES: Discipline and discharge - Grounds for - Personal appearance 7:3550.

CIRCUMSTANCES: The Grievors claimed that since some other employees were allowed to wear jeans, and since the Employer did not issue work pants, they did not have to abide by the dress code which forbade jeans.

AWARD: The grievance fails. The dress code was both reasonable and clear, and the fact that there were isolated instances of employees wearing jeans does not mean that the Grievors were entitled to disregard the code.

AUTHORITIES: Re Lumber and Sawmill Workers' Union, Local 2537 and K.V.P. Co., Ltd. (1965) 16 L.A.C. (Robinson).

DECISION: 88-066

Western Electrics Ltd. AND Brotherhood of Electrical Workers, Local 625

Kydd, William H. - Arbitrator

Gordon Forsythe, for the Union
David MacDonald, for the Employer

July 22, 1988

ISSUES: Discipline and discharge - Just cause 7:1200; Lay-Off 6:2200; Management rights - Arbitrariness and discrimination 5:3220.

CIRCUMSTANCES: The Grievor, an electrician, claims that he was dismissed arbitrarily because the Employer had "had a run in" with him years earlier. The Employer claimed that the Grievor had simply been laid off because there was not enough work, and that the agreement gave management the right to determine who should be laid off.

AWARD: The grievance succeeds. This was not a normal lay-off; at the time of the decision to discharge the Grievor there was enough work to keep him. There were no other legitimate grounds for dismissal, as an Employer cannot terminate an employee simply because of not liking the employee. Therefore, the Grievor was wrongfully discharged and is entitled to damages.

AUTHORITIES: United Brotherhood of Carpenters and Joiners of America, Local 1588 and Yorkdale Drywall Ltd. (Boudreau, Arbitrator).

DECISION: 88-067

Aberdeen Hospital Commission AND Nova Scotia Nurses' Union

Darby, Peter E. (for Douglas Ruck) - Chair; Larkin, Raymond;
MacDougall, Donald H.

John MacEwan, for the Union
Wylie Spicer, for the Employer

July 29, 1988

ISSUES: Vacation - Computation of vacation and vacation pay 8:3220, 8:3230 - Day defined 4:2100 - Period of service 8:3220.

CIRCUMSTANCES: The Grievor claims that by reducing vacation entitlement for time lost through maternity leaves, the Employer has violated the agreement. The Employer claims that the accumulation of vacation credits is conditional upon "actual performance" and that, therefore, if an employee misses three months of working days in a year due to maternity leave, there should be an equivalent reduction in vacation entitlement.

AWARD: The grievance succeeds. In order to prorate vacation entitlements, the parties must state so very clearly in the agreement. All the article relied upon by the Employer mandates is that when working days is a relevant consideration in calculating vacations, its meaning is to be determined by the standard given, i.e., did the employee get paid compensation for that day.

DISSENT: (McDougall) The grievance should be dismissed. The days on maternity leave are unpaid, and the parties to the agreement did make a "clear expression of intention to the contrary" of the rule that employees on maternity leave were entitled to count such time for vacation calculations. In the article relied on by the Employer, it is stated that "any day for which compensation was paid ... shall be considered a working day for the purposes of calculating vacation".

AUTHORITIES: Re The Food Group Inc. and Retail, Wholesale and Department Store Union, Local 1065 (1986) 23 L.A.C. (3d) 434 (Bruce). Re Air Canada and Canadian Airline Employees' Association (1977) 13 L.A.C. (2d) 225 (H.D. Brown). Labour Standards Code, S.N.S. 1972, C. 10, s. 56 (4). Brown & Beatty, Canadian Labour Arbitration (2nd ed., 1984, Can. Law Book Co.). C.U.P.E., Local 1431 and Public Service Commission of Halifax (November 9, 1982) unreported (Outhouse). Re Toronto Star Newspapers Ltd. and Printing and Graphic Communications Union, Local N-1, (1981) 30 L.A.C. (2d) 267 (Weatherill). Re Maritime Telegraph and Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983) 12 L.A.C. (3d) 90 (Outhouse).

DECISION: 88-068

Crossley Karastan Carpet Mills Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

Outhouse, Bruce - Chair; Morrison, George; Nichols, D. Arthur

Blaise MacDonald, for the Union
Jim Leefe, for the Employer

July 8, 1988

ISSUES: Arbitrability - Statutory requirement 2:1100; Collective agreement - Form and content - Ancillary documents 4:1200.

CIRCUMSTANCES: This case deals with the issue of whether or not an appendix to a collective agreement, dealing with the scheduling of employees' shifts, formed part of the agreement. The Grievor claimed that the appendix was an undated Memorandum of Agreement subject to ratification by its membership. The Employer claimed that what the Grievors signed was the entire collective agreement in its final form, including the appendix. The Employer also claimed that the Board was bound to accept the collective agreement at face value and that it did not have authority to determine that the appendix is not part of the agreement.

AWARD: The grievance fails. Regarding arbitrability, as the grievance involved differences "relating to interpretation, application or administration" the Board had jurisdiction under the Trade Union Act, s.40. Regarding the subject matter of the grievance: if, as the Grievors claim, the appendix was subject to ratification, the Grievor would have taken exception to the printing of the contract after the Employer notified the Grievor that the final agreement, including the appendix, was being sent to the printers. In addition, the grievors took no steps to have the appendix ratified.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2nd ed). Brown & Beatty, Canadian Labour Arbitration (2nd ed.). Re Trustees of Ottawa Civic Hospital (1971) 22 L.A.C. 325 (Weatherill). Trade Union Act. Sack and Mitchell, Ontario Labour Relations Board Law and Practice (2nd ed.) pp. 261-263. Re Galdino Berdwsko et al v. United Steelworkers of America [1977] O.L.R.B. Rep. 774. Re James Howden et al v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 [1973] O.L.R.B. Rep. 120. Re International Brotherhood of Boilermakers, etc. and Howden & Parsons (Canada) Ltd. (1970) 21 L.A.C. 177 (Weiler). Re Bakery & Confectionery Workers' Union, Local 264 and Canada Bread Co. Ltd. (1969) 20 L.A.C. 64 (Weiler). Re St. Lawrence Seaway Authority and Public Service Alliance of Canada (1976) 13 L.A.C. (2d) 9 (Weatherill). Re Hydro Electric Power Commission of Ontario and Canadian Union of Public Employees, Local 1000 (1975) 8 L.A.C. (2d) 180 (Adams). Re C.N.

Telecommunications and C.N. Telecommunications Union - United Telegraph Workers, Local 43 (1976) 11 L.A.C. (2d) 152 (Rayner). Re Canadian Liquid Air Ltd. and United Steelwowrkers (1974) 6 L.A.C. (2d) 277 (Brown). Re United Steelworkers, Local 2847 and General Steelwares Ltd. (1966) 17 L.A.C. 304 (Lande).

DECISION: 88-069

Halifax (City) AND International Assn.of Fire Fighters, Local Union No. 268

Darby, Peter E. - Arbitrator

John P. Merrick, Brian G. Johnston, for the Union
Barry Allen, for the Employer

August 22, 1988

ISSUES: Arbitrability - Withdrawal by grievor 2:3230; Skill and ability - Examinations and tests 6:3340.

CIRCUMSTANCES: During an examination in which the Grievor and others took part, the examinees were given both scrap paper and answer sheets to write on and hand back. Only the answer sheet was to be evaluated but, in the case of the Grievor, the scrap paper was also marked, accidentally, resulting in a passing grade for the Grievor which he would not have achieved otherwise. The Board, the Grievor, the Union and the Employer all agreed to dispense with the conventional adjudicative techniques and all parties supervised the inspection of every examination paper.

AWARD: The grievance is withdrawn. The only scrap paper evaluated for credit was that of the Grievor, so the Grievor withdraws his grievance, because it would be unfair for him to pass the examination under those circumstances.

DECISION: 88-070

Construction Management Bureau Ltd. (Lynk Electric Ltd.) AND Cape Breton Island Construction and Trades Council (International Brotherhood of Electrical Workers, Local 1852)

MacDougall, R. Lorne - Arbitrator

J. Bernard Boudreau, for the Union
Greig MacLeod, for the Employer

August 22, 1988

ISSUES: Lay-Off - Status of employees 6:2352; Work assignment - Bargaining unit work 5:1200; Estoppel - Delay in complaining or grieving 2:3210.

CIRCUMSTANCES: The Grievor claims to have been improperly laid off as there were three other persons in the bargaining unit of less seniority employed at the date of his lay-off. The Employer claims that the employee's work did not fall under the definition of "Construction Industry" work and, therefore, the employee was not protected by the collective agreement.

AWARD: The grievance succeeds. Until the time of the lay-off the workers in the Grievor's department had been given all the benefits of the agreement. In addition, they were allowed to transfer from one work site to another without going through the Union Hiring Hall. Therefore, the Grievor is considered to be under the protection of the collective agreement, and is entitled to reinstatement.

AUTHORITIES: The Trade Union Act, S.N.S. 1972, C. 19. George L. Mitchell Electrical Limited and I.B.E.W., Local 625 (J.A. MacLellan, Arbitrator). Labourers' International Union of North America, Local 615 and Seaport Contractors Limited (Bruce Outhouse). Re Douglas Ltd. and United Glass and Ceramic Workers, Lcoal 203, 26 L.A.C. (2d) 94.

DECISION: 88-071

Metropolitan Authority AND Halifax Civic Workers' Union, Local 108

Veniot, Milton J. - Arbitrator

n/a, for the Union
n/a, for the Employer

August 23, 1988

ISSUES: Unknown.

CIRCUMSTANCES: Unknown.

AWARD: The matter was settled between the parties and no award was required.

DECISION: 88-072

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

MacDougall, R. Lorne, - Chair; North, Gregory I.; Quigley, Rene

Blaise MacDonald, for the Union
Jonathan Davies, for the Employer

August 8, 1988

ISSUES: Innocent absenteeism, 7:3210; Illness or disability - Employer response - Alternatives to termination - Lay-Off 6:2200; Remedies - Substitution of lesser penalty 2:1470; Discipline and discharge - Absence of just cause provision 7:1200.

CIRCUMSTANCES: The Grievor was discharged when his own doctor said that he was fit to work, but he refused to return because he honestly did not feel that he was able enough to return to the type of work he had been doing.

AWARD: The grievance succeeds in part. The collective agreement gave the Board power to substitute for discharge any penalty it felt to be just and reasonable. Although the Grievor's absences have frustrated the Employer, the Grievor had been an average employee, at least, for 10 years. Therefore, the discharge is to be replaced by a lay-off status, and if within one year a position becomes available which he is capable of performing, he shall be offered it. If no such position arises, then the original discharge shall stand.

DECISION: 88-073

Isaak Walton Killam Hospital for Children AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606

MacLellan, J.A. - Arbitrator

Gordon Forsyth, for the Union
Jan Silliker, for the Employer

August 25, 1988

ISSUES: Discipline and discharge - Grounds for - Lateness 7:3140; Good faith - Discriminatory discipline 7:4414.

CIRCUMSTANCES: The Grievor overslept and was told not to come to work for her shift. A warning letter was sent to the Grievor following the incident. The Grievor claimed that the she should have been allowed to come to work because she had not been replaced at the time she phoned. The Grievor also claimed that the Employer discriminated against her because the rules regarding lateness were not the same in other departments.

AWARD: The grievance succeeds in part. Employees and supervisors were confused over the lateness policy, as some departments did treat lateness differently. However, the warning letter to the Grievor was not inappropriate. Yet, given the inconsistent way in which the rule was applied, the Grievor should not lose a full day's pay and is to be reimbursed.

DECISION: 88-074

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Cromwell, T.A. - Arbitrator

R. Pink, for the Union
A. Scott, for the Employer

August 18, 1988

ISSUES: Discrimination - Discipline - Probationers 7:5020; Probationary employee 7:5000; Discipline and discharge - Just cause 7:1200.

CIRCUMSTANCES: The Grievor, a probationary employee, claims that she was discharged as a result of discrimination against her sex, marital status and physical handicap. The Grievor, a pregnant, single parent with health problems, had a record of minor difficulties in job performance, such as punctuality, failing to call in, etc. The Employer denied discrimination and claims that there are legitimate reasons for discharge, especially given the Grievor's probationary status.

AWARD: The grievance fails. The evidence is inconsistent with any inference of discrimination. In addition, in the case of probationary employees, the Employer does not have to meet a just cause standard, so, although the Grievor's inadequacies were minor, they were enough to show that the Employer acted in good faith and without discrimination.

DECISION: 88-075

Nova Scotia Home for Coloured Children AND Canadian Union of Public Employees, Local 3016

MacLellan, J.A. - Chair; Wright, Robert; Weir, Charles

A.K. Cunningham, for the Union
Colin D. Bryson, for the Employer

August 29, 1988

ISSUES: Probationary employee - Probationary period 7:5010; Discipline and discharge - Just cause 7:1200; Estoppel - Condonation 2:2220.

CIRCUMSTANCES: The Employer claims that the Grievor did not complete her probationary period and that, therefore, just cause need not be shown for discharge. The Employer further claims that, although the probationary period was extended in the case of the Grievor, the Grievor is estopped from relying on the agreement because the Employer has extended probationary periods for some years prior to this occasion. The Grievor claimed that her probationary period was complete and that she was discharged without just cause.

AWARD: The grievance succeeds. There is no evidence of condonation by the Union of extensions of the probationary period. Therefore, the Grievor's probationary period was completed. Although the Grievor's work performance was not without fault, she was not given sufficient time to show improvement and was discharged without just cause. The employer is ordered to make a lump sum payment to the Grievor and to offer her her former position.

DECISION: 88-076

Maritime Beverages Ltd. AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

MacDougall, R. Lorne - Chair; McDougall, Donald H.; Jewers, Wallace

Thomas Pittman, for the Union
Eric B. Durnford, for the Employer

August 29, 1988

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612; Management rights - Revision of job content 5:2200.

CIRCUMSTANCES: A verbal warning was given to the Grievor, a Route Merchandiser, for refusing to merchandise back stock as directed by the Employer. The Grievor claims he is not being paid for the movement of back stock that he has not personally delivered to the store and such movement should not be part of his duties.

AWARD: The grievance fails. The Route Merchandiser's job is part of a team effort in which overlapping responsibility is part of the system. The Employer does have the right to assign the movement of back stock in the way that it has done.

DECISION: 88-077

Nova Scotia (Department of Transport and Communications) AND Canadian Union of Public Employees, Local 1867

Archibald, Bruce P. - Chair; North, Gregory I.; Quigley, Rene

Blaise MacDonald, for the Union
Jonathan Davies, for the Employer

August 25, 1988

ISSUES: Discipline and discharge - Grounds For - Theft 7:3310, 7:3312, 7:3314; Disciplinary penalties - Mitigating factors - Condonation 2:2220, Rehabilitative potential 7:4422.

CIRCUMSTANCES: The Grievor admits to stealing the Employer's property but claims that the penalty of dismissal was too severe, given the Grievor's work record, his contriteness and the absence of a clear policy from the Employer.

AWARD: The grievance succeeds. Given the mitigating circumstances, a discharge is not warranted. The Grievor is to be suspended for a full year, accumulating no seniority rights, and the Grievor is to be compensated for loss of wages and benefits for the period from the date of his discharge to the time of his taking up his employment.

DISSENT: (North) Although the termination of the Grievor should be replaced by a suspension without pay, as the majority suggests, no order as to compensation should be made.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (2nd ed.). Palmer, Collective Agreement Arbitration in Canada (2nd ed.) Butterworths, Toronto, 1983. Canadian Union of Public Employees, Local 1867 and the Department of Transportation and Commuications, Unreported (March 14, 1988, Archibald, Bell and North, Arbitrators). Re Weiser Inc. and Canadian Assoc. of Industrial Mechanical and Allied Workers, Local 20 (1986) 23 L.A.C. (3d) 331 at p. 334. Re Phillips Cables Ltd. and the International Union of Electrical, Radio and Machine Workers, Local 510, (1974) 6 L.A.C. (2d) 35 at p. 37. Re United Electrical Workers and Canadian General Electric Co. Ltd. (1958) 8 L.A.C. 238 (Little). Re Polymer Corp. Ltd. and Oil Chemical and Atomic Workers, Local 9-14 (1973) 4 L.A.C. (2d) 1448 (Palmer).

DECISION: 88-078

Kenmount Ford Sales Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 506

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
George Khattar, for the Employer

August 29, 1988

ISSUES: Work assignment - Bargaining unit work 5:1200, 5:2000, - Contracting out - Employees outside unit 5:1400.

CIRCUMSTANCES: When one member of the bargaining unit was appointed Wholesale Sales Manager, he left the bargaining unit but continued to have the same work plus some extra responsibilities. The Grievor claims that the Employer violated the agreement by assigning work normally done by a member of the bargaining unit to an employee outside the unit.

AWARD: The grievance succeeds. The duties presently carried out by the employee are substantially the same duties he performed while a member of the bargaining unit.

DECISION: 88-079

National Sea Products Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 611

MacLellan, J.A. - Arbitrator

Raymond Larkin, for the Union
David E. Reid, for the Employer

September 1, 1988

ISSUES: Termination - Resignation 7:7100; Resignation - Intention 7:7100.

CIRCUMSTANCES: The incident which brought about this grievance aboard a factory freezer owned by the company. The Bosun began interfering with crew members and when confronted with this by the Grievor, the Bosun became enraged and threatened to harm him. Upon requesting assistance from the company representatives, the Grievor was given assurance of his personal safety but continued to be harassed by the Bosun. Under these conditions, the Grievor, in an emotional outburst, told the Captain he was quitting his job. Upon leaving the ship however, the Grievor refused to sign an acknowledgement that he had quit his job and instead advised the Captain that he had not quit. Upon the ship's return to home port, the Bosun was fired and the Grievor was not returned to his job. The issue to be decided is whether the Grievor voluntarily quit, resulting in the company having no obligation to re-employ him.

AWARD: The grievance succeeds. Although the Grievor used the words "I quit", there is no other objective element present to support the fact that the Grievor truly wanted to quit his job.

AUTHORITIES: Re University of Guelph and Canadian Union of Public Employees, Local 1334 (1973) 2 L.A.C. (2d) 251.

DECISION: 88-080

Metropolitan Authority AND Amalgamated Transit Union, Local 508

Outhouse, Bruce - Arbitrator

Kim Turner, for the Union
Terry Roane, for the Employer

August 31, 1988

ISSUES: Statutory holidays - Qualifying days 8:3120, - Holiday pay and other benefits 8:3140.

CIRCUMSTANCES: The Grievor is seeking holiday pay for a statutory holiday. The Employer is refusing to pay, claiming the Grievor did not make himself available to work on the Grievor's last scheduled workday prior to the holiday. The Friday of a long weekend was the Grievor's last scheduled workday. Previous to this date the Grievor requested leave without pay, which had been granted. On Saturday the Grievor took an out-of-town trip and upon returning experienced trouble with his vehicle outside of Halifax. The Grievor, realizing he would be late for his evening shift called in to dispatch. Both the Grievor and the Employer agree the aforementioned call was made. The grievance arises out of what was said between the two. However, according to the Arbitrator, the true issue in this grievance pertains to whether or not the Grievor reported, within the stipulated time limit, that he would in fact be late for work.

AWARD: The grievance succeeds. The issue in this grievance was whether or not the Grievor reported that he would be late for work within the stipulated time limit. As both parties agree that a call was made, the arbitrator has decided in the Grievor's favour. The Employer is ordered to pay the Grievor holiday pay for the statutory holiday in question. Jurisdiction is retained by the arbitrator to fix the precise amount of compensation in the unlikely event that the parties are unable to agree on same.

AUTHORITIES: Re South Alberta School Authorities Association and Alberta Teachers' Association (1976) 1 L.A.C. (2d) 227 (Mason). Re Commissioner of Northwest Territories and Northwest Territories Public Service Association (1986) 24 L.A.C. (3d) 132 (Hope).

DECISION: 88-081

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Cotter, W. Brent - Arbitrator

Ronald Pink, Kim Turner, for the Union
Alison Scott, for the Employer

June 30, 1988

ISSUES: Insurance and welfare plans - Medical benefits and other benefits 8:3330; Management rights - Power to discipline 7:1000; Absenteeism 7:3112; Discipline and discharge - Grounds for - Absence from work - Reasonable excuse 7:3112.

CIRCUMSTANCES: This grievance deals with the right of an employer to issue standing directives to employees as a means of disciplinary action. The two Grievors in this case received such directives as the Employer became concerned about the pattern of absenteeism displayed by the Grievors.

AWARD: There were two individual Grievors in this case and separate awards were made by the Adjudicator. In regard to the first Grievor, the grievance succeeds. The standing directive is suspended and removed from the Grievor's file. In regard to the second Grievor, the grievance fails and the Grievor is dismissed since the absenteeism pattern for this individual is questionable.

DECISION: 88-082

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1

MacLellan, J.A. - Arbitrator

Raymond Larkin, for the Union
Brian Johnston, for the Employer

September 9, 1988

ISSUES: Reasonableness - Employee belief re safety 7:3621; Wages - Withholding wages 8:1420.

CIRCUMSTANCES: The Grievors were docked wages after refusing work they considered dangerous. At the time, the Employer insisted that no danger was present. The Grievors argue that they believed their health and safety were at risk, and therefore should be reimbursed for lost wages.

AWARD: The grievance succeeds and the lost wages are to be reimbursed. Evidence supported the Union's claim that the Grievors believed their safety was endangered, therefore the Grievors had a right to refuse work until the Employer corrected the dangerous situation, or the Safety Committee advised the Grievors to return to work.

AUTHORITIES: Robert Phanand et al v. Inco Metals Company (1980) 3 C.L.R.B.R. 1 (Ont. L.B.R.) p. 208. William Gallivan v. Cape Breton Development Corporation (1982) 1 C.L.R.B.R. 241, p. 250. Francine Tremblay v. Bell Canada (1985) 59. Michael McKye v. Canadian Pacific Railway (1983), 52. Occupational Health and Safety Act, S.N.S. 1985, c. 3, Sec. 22 (1) a, Sec. 22 (1) b, Sec. 22 (1) c, Sec. 22 (4), Sec. 22 (6) a, Sec. 22 (6) b, Sec. 24 (1), Sec. 25 (1), Sec. 25 (2) a, Sec. 25 (2) b, Sec. 25 (2) c, Sec. 25 (2) d, Sec. 25 (3), Sec. 25 (4).

DECISION: 88-083

Universite Sainte-Anne AND Service Employees' International Union, Local 902

Outhouse, Bruce - Chair; Quigley, Rene; Gaudet,Thomas

Glen Mitchell, for the Union
Roseann Runte, for the Employer

September 14, 1988

ISSUES: Statutes - Applied by boards of arbitration 2:2100; Wages - Equal pay for equal work 8:1100; Job classifications and descriptions - Creation or revision - Burden of proof 3:2414; Evidence - Burden of proof 3:2400; Arbitrability - Procedural limitations - Exhaustion of grievance procedure 2:3128.

CIRCUMSTANCES: The Grievor, a cleaner, alleges that the Employer has violated section 55(1) of the Labour Standards Code by paying the Grievor at a wage rate less than that paid to male employees performing substantially the same work. The Employer maintains there is a real distinction between the Grievor's work which is classified as light housekeeping, and janitor's work which is categorized as heavy cleaning. The Employer concludes the Grievor is being properly paid at the housekeeping rate.

AWARD: The grievance fails based on the evidence that the work performed by the Grievor is not substantially the same as the work performed by janitors within the meaning of section 55(1) of the Code.

AUTHORITIES: Trade Union Act S. 41(1)(e). Labour Standards Code S.N.S. (1972) c 10. Re Attorney General for Alberta and Gares et al, 1976, 67 D.L.R. (3d) 635 (Alta. S.C., T.D.). Re Leisure World Nursing Homes Ltd. and Director of Employment Standards et al (1980), 112 D.L.R. (3d) 540 (Ont. H.C., Div. Ct.). The Brantford General Hospital v. Director of Employment Standards (March 3, 1986), unreported (Ont. Div. Ct.).

DECISION: 88-084

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Cromwell, T.A. - Arbitrator

Thomas Pittman, for the Union
Jonathan Davies, for the Employer

September 13, 1988

ISSUES: Job posting - Vacancy 5:2520; Vacancy - Job posting 5:2510; Policy grievance - Nature 2:3124.

CIRCUMSTANCES: The Grievors claim the Employer has failed to post an existing vacancy. The Employer claims there is no vacancy.

AWARD: The grievance fails. Evidence presented falls short of establishing call-ins, use of overtime or employment of non-bargaining members to the extent that such devices are being resorted to by management to fill a vacancy that should be posted.

AUTHORITIES: Re Oil, Chemical and Atomic Workers and Tidewater Oil Company of Canada Limited (1963) 14 L.A.C. 233 (Reville). Re Polymor Corp. Limited and Oil, Chemical and Atomic Workers (1974), 5 L.A.C. (2d) 344 (Rayner). Re Horton Steel Work Limited and U.S.W. (1973) 3 L.A.C. (2d) 54 (Rayner). Re Air Canada and Canadian Airline Employees' Association (1975) 8 L.A.C. (2d) 239 (Brandt). Re Pilkington Brothers Canada Limited and United Glass and Ceramic Workers (1976) 13 L.A.C. (2d) 287 (Burkett).

DECISION: 88-085

K-Line Maintenance and Construction Ltd. AND International Brotherhood of Electrical Workers, Local 1928

Cromwell, T.A. - Arbitrator

Raymond Larkin, for the Union
Brian G. Johnston, for the Employer

September 16, 1988

ISSUES: Disciplinary penalties - Reasonableness 7:4300, - Progressive discipline 7:4422; Discipline and discharge - Just cause 7:1200, - Grounds for - Absence from work - Failure to notify employer 7:3110; Probationary employee - Discipline 7:5020, Arbitrability 2:1100; Reinstatement 2:1470.

CIRCUMSTANCES: The Grievor was discharged after failing to show up for work on two occasions. In the first instance, the Grievor did not notify the Employer of his absence, and in the second instance the Grievor's wife telephoned the Employer 1.5 hours after the start of the shift. The Employer served the Grievor with a written warning regarding unnotified absence after the first incident. The Grievor admits there was cause for discipline, but alleges the penalty of discharge was neither just nor reasonable in the circumstances. The Employer seeks to uphold the termination of the Grievor on a number of grounds, namely the Grievor was a probationary employee and just cause need not be shown. In addition, the collective agreement contains no just cause provision, allowing the Employer to terminate any Employee without demonstrating just cause. Finally, the Employer feels the penalty of discharge was just and reasonable in the circumstances.

AWARD: The grievance succeeds. The penalty of discharge is vacated and a 14-day suspension is substituted; the Grievor is to be reinstated with compensation. The Employer did not have the right to discharge an employee other than for cause or upon the giving of reasonable notice. The Board determined that the situation as it has been revealed in the evidence was not sufficiently serious to warrant discharge when the Grievor's employment record consisted of one warning for the same sort of conduct.

AUTHORITIES: Re Steinberg (1982) 7 L.A.C. (3d) 289 at 304. Re Telegram Publishing Company Limited (1957) 67 D.L.R. (3rd) 404 at 411. Trade Union Act, s. 41. Hawker Siddley Canada v. United Steelworkers of America (1983) 59 N.S.R. (2d) 29. N.S.G.E.U. v. Civil Service Commission (September 11, 1986, Outhouse). Re Canadian Union of Public Employees, Local 2330 v. Adult Residential Centre (Veniot, Undated). Re N.S.G.E.U. v. Civil Service Commission (Crownwell, March 1987). Re N.S.G.E.U. and Civil Service Commission (Nathanson, October 26, 1987). Re CN CP Telecommunications (1981) 4 L.A.C. (3d) 205 at 207-208. Re Maritime Telegraph and

Telephone Co. Limited and International Brotherhood of Electrical Workers, Local 1030 (1983) 12 L.A.C. (3d) 90 at 95. McGavin Toastmaster Limited v. Ainscough (1975); 54 D.L.R. (3d) 1. Retail, Wholesale and Department Store Union, Local 414 (1980) 28 L.A.C. (2d) 164. Re Retail, Wholesale and Deparmtnet Stores Union and Hershey Chocolate (1970) 21 L.A.C. 83. Re Zellers Western Limited (1972) 31 D.L.R. (3d) 742 (Sask. C.A.) at 745; aff'd [1975] S.C.R. 376. Carrothers, Parmer and Rayner; Collective Bargaining Law in Canada (2nd, 1986) at 503. Re N.S.G.E.U. and the Civil Service Commission (award dated November 15, 1987). S.K.F. Manufacturing (1975) 9 L.A.C. (2d) 139 at 140 (Shime). Re North York General Hospital and C.U.G.E. (1973) 5 L.A.C. (2d) 45 at 46-47 (Shime).

DECISION: 88-086

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Darby, Peter E. - Chair; Durnford, Eric; Tynes, Michael

Ronald A. Pink, for the Union
Jonathan Davies, for the Employer

September 12, 1988

ISSUES: Illness or disability - Employer response - Alternatives to termination - Absenteeism 7:3200, 7:3210; Discipline and discharge - Evidence - Burden of proof 3:2411.

CIRCUMSTANCES: The Grievor was discharged for excessive innocent absenteeism. The Union alleges the Employer cannot exercise this power to discharge because of a new comprehensive sickness and benefit plan. The Employer argues that the Grievor was working at the time of the discharge and not in receipt of benefits under the Plan, and therefore the Employer was free to discharge him for innocent absenteeism. Evidence regarding the Grievor's past record showed excessive absenteeism despite repeated warnings and disciplinary action. However, evidence also indicated the Grievor was suspected of sick leave abuse which would require just and sufficient cause for dismissal as a disciplinary measure.

AWARD: The grievance succeeds in part, although not for the original reasons put forth by the Union. The Grievor is to be reinstated as soon as conveniently practicable; but with no payment of back pay. There is sufficient doubt about the discharge being for innocent absenteeism to warrant rescinding the discharge.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d ed. 1984) p. 371. Re Malta Coal Ltd. and Alta. Strip Miners' Union (1984) 20 L.A.C. (3d) 58 at 62 (Sychuk). Re Government of Province of Alberta and Alberta Union of Provincial Employees (1987) 29 L.A.C. 3d) 218 (Tadman) at 227. Palmer, E.E., Collective Agreement Arbitration in Canada (2d ed. 1984) p. 420. Nova Scotia Government Employees' Union and Civil Service Commission (July 14, 1987), unreported (Outhouse). Re Governing Council of University of Toronto and Canadian Union of Public Employees, Local 1230 (1976) 13 L.A.C. (2d) 267 (O'Shea). Re DeHaviland Aircraft of Canada Ltd. and United Auto Workers, Local 112 (1982), 9 L.A.C. (3d) 271 (Rayner). Re United Rubber Workers an Seiberling Rubber Co. of Canada Ltd. (1969) 20 L.A.C. 267 at p. 275. Re U.A.W., Local 397 and Barber Ellis of Canada Ltd. (1968) 19 L.A.C. 163 at p. 176-7. Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414 (1978). Re Kelsey-Hayes Canada Ltd. and U.A.W., Local 195 unreported (Samuals). Amalgamated Transit Union, Local 508 and Metropolitan Transit Commission, unreported (Outhouse) July 22, 1982. Re U.A.W., Local 458 and Massey-Ferguson Industries Ltd. (1972) 24 L.A.C. 344 (Shime). Re City of Toronto and Canadian Union of Public Employees, Local 43 (1974) 7 L.A.C. (2d) 160 (Adams). Re Atlas Steels Co. and Canadian Steelworkers' Union, Atlas Division (1975) 8 L.A.C. (2d) 360 (Weatherill). Re Crouse-Hinds Canada Ltd. and U.A.W. (1981) 3 L.A.C. (3d) 230 (Brown). Re Niagara Structural Steel (St. Catharines) Ltd. and U.S.W., Local 7012 (1978) 18 L.A.C. (2d) 385 (O'Shea). Brown and Beatty, pp. 373-4. Re Molson's Brewery (Ontario) Ltd. and United Brewery Workers, Local 304 (1984) 13 L.A.C. (3d) 112 (Brandt) p. 122. Re International Association of Machinists, Lodge 1703, and Perfect Circle - Victor Division, VNG Auto Parts Ltd. (1973) 24 L.A.C. 380 (Weiler).

DECISION: 88-087

Louisbourg (Police Commission) AND Canadian Union of Public Employees, Local 2279

MacDonald, David J. - Chair; McDade, Bruce R.; MacNeil, Kevin

Robert Crosby, for the Union
J. Bernard Boudreau, for the Employer

August 16, 1988

ISSUES: Collective agreement - Term of operation 4:1620, - Matters arising outside of 2:1200; Arbitrability - Agreement as primary source of jurisdiction 2:1200; Statutes - Applied by board of arbitration 2:2100.

CIRCUMSTANCES: The Grievors were terminated by the Employer upon the expiry of their collective agreement on December 31, 1987. The Employer had notified the Grievors of its intentions by letter in September 1987. The Union alleges the Employer violated provisions regarding just cause, job security, and lockout by this action. In addition, the Union charges the Employer did not have authority to terminate the group and that the collective agreement was still in force.

AWARD: The grievance fails. The evidence is clear that the collective agreement was terminated as of December 31, 1987 and the terms and conditions governing the employment relationship ceased on that date. The termination of the Grievors' employment was not related to any culpable behaviour but to the fact that their jobs ceased to exist. In addition, evidence shows that proper procedure was followed in effecting the termination of the Grievors' employment.

AUTHORITIES: Police Act, R.S.N.S. C.P. 17. Trade Union Act, S.N.S. s. 40, s. 41.

DECISION: 88-088

University College of Cape Breton AND Nova Scotia Government Employees' Union, Local 18, Maintenance Classification (MOS)

McIntyre, Leo - Chair; McDade, Bruce; D'Orsay, John

Kimberley Turner, for the Union
Bernard Boudreau, for the Employer

July 28, 1988

ISSUES: Illness or disability - Holiday pay - Entitlement 8:3123; Vacation 8:3210 - Computation of vacation and vacation pay 8:3230; Insurance and welfare plans - Entitlement to benefits 8:3320; Interpretation - Words and phrases - Length of service - Continuously at work 6:1110 fn 2; Seniority - Acquisition - Non-working periods 6:1110.

CIRCUMSTANCES: The Grievor had been with the Employer for eighteen years when he went off work due to a compensable accident. He has not returned to work nor is he likely to do so. The grievance arises from a two-month period between the Grievor's collecting Worker's Compensation Benefits and being placed on Long Term Disability. The Grievor originally received vacation pay for this period, but was subsequently awarded Short Term Disability. The Grievor argues he is entitled to receive vacation pay for this period since he was still an employee within the terms of the collective agreement.

AWARD: The grievance fails. The Board rules that the benefit of vacation entitlement is not due the Grievor in this instance, nor is there a provision in the collective agreement for the payment of vacation benefits while in receipt of Worker's Compensation Benefits.

DISSENT: D'Orsay contends the collective agreement does have provision entitling the Grievor to vacation. D'Orsay strongly suggests the Board's interpretation will create problems for other potential Grievors in similar circumstances.

AUTHORITIES: Webster's Dictionary. Re Religious Hospitalleis of St. Joseph and Service Employees' International Union, Local 210, 25 L.A.C. (2d) 221. Re Lethbridge General and Auxiliary Hospital and Nursing Home District No. 65 and United Nurses of Alberta, 16 L.A.C. (3d) 372.

DECISION: 88-089

Halifax (City) AND Canadian Union of Public Employees

Archibald, Bruce P. - Arbitrator

Kimberley Turner, for the Union
Thomas Donovan, for the Employer

September 16, 1988

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310, 7:3314,; - Just cause 7:1200; Evidence - Burden of proof - Applications - Discipline 3:2411, 7:2300, - Documents - Admission into evidence 3:3100.

CIRCUMSTANCES: The Grievor was dismissed from his position as head janitor as a result of his involvement in the theft of a carton of fluorescent light bulbs which were under his care and control. The Grievor had given a co-worker permission to take the bulbs for personal use. Evidence regarding the Grievor's employment history indicated rehabilitation or reintegration into the workplace was not likely.

AWARD: The grievance fails. The Board found that the Grievor's involvement in the attempted theft/misappropriation of the Employer's property has given the Employer just and reasonable cause for discipline and dismissal. To reinforce this, it was determined that a satisfactory employment relationship was unlikely to be re-established.

AUTHORITIES: Wm. Scott and Company Ltd. and Canadian Food and Allied Workers' Union, Local P-162 (1976) C.L.R.B. Reports I (Weiler, Chair). Re Borough of North York and C.U.P.E. (1979) 20 L.A.C. (2d) 289, p. 291. Re Canadian Lukins Ltd. and U.S.W. (1976) 12 L.A.C. (2d) 439 (Schiff). British Columbia Telephone Company and Telecommunications Union [1980] 2 W.L.A.C. 547 at pp. 550-1. Re Reg. Mun. of Ottawa-Carleton (1984) 13 L.A.C. (3d) 445. Re Endusmin Limited and Cement Line and Gypsum Workers' International Union, Local 488 (1978) 20 L.A.C. (2d) 87, at p. 89. R. v. Oakes (1986) 50 C.R. (3d) 1. R. v. Pace [1965] 3 C.C.C. 55 (N.S.C.A.). Canadian Union of Public Employees, Local 2336 and V.G. Services Limited, May 13, 1983, unreported. C.U.P.E., Local 1867 v. The Department of Transportation of Nova Scotia, unreported (April 11, 1988, Archibald, North and Bell). Langley Memorial Hospital and Hospital Employees' Union, Local 180 (1985) 18 L.A.C. (3d) 123 (Thompson). Atlantic Building Cleaning Limited and Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers' Union, Local 927 (Outhouse).

DECISION: 88-090

O'Malley Electric Ltd. AND International Brotherhood of Electrical Workers', Local 625

MacLellan, J.A. - Arbitrator

Fern J. Tardif, for the Union
Clyde O'Malley, for the Employer

September 30, 1988

ISSUES: Lay-Off - Burden of proof 3:2415, - Notice 2:1425; Discipline and discharge - Grounds for - Work performance - Isolated occurence 7:3542.

CIRCUMSTANCES: The Grievor, a second-year electrical apprentice, was dismissed from his position after one month's employment. The reason given by his supervisor was the Grievor's inadequate performance; in addition the Employer expressed doubts as to the Grievor's suitability for the position. The Grievor had no knowledge of the Employer's dissatisfaction with his performance prior to his dismissal. The Grievor seeks reinstatement with payment of all lost wages and benefits retroactive to the date of lay-off.

AWARD: The grievance succeeds. The grievor is to be reinstated in the position he occupied upon termination and be reimbursed for all lost wages and benefits. The Employer did not provide sufficient evidence of the Grievor's allegedly poor work performance, and therefore acted improperly in terminating him. In addition, the Employer should have spoken to the Grievor, an apprentice, about his performance and given him an opportunity to improve.

DECISION: 88-091

Northside-Victoria District School Board AND Canadian Union of Public Employees, Local 981

MacLellan, J.A. - Arbitrator

Gerald Yetman, for the Union
Eric Durnford, for the Employer

September 20, 1988

ISSUES: Job posting 5:2520, 6:2310; Skill and ability - Criteria of ability and qualifications - Bona fides of 6:3300; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: The Grievor was unsuccessful in a competition for a job transfer. The Grievor requests he be given this position due to his seniority; he also claims the job was incorrectly posted because changes had been made in the job description. The Grievor also charges the Employer was discriminating against him because of his position as president of the union. This Grievance is related to an earlier one regarding this position. The position had been declared redundant after the previous incumbent who was ill and unable to perform all the duties, left the Employer. Arbitration reinstated the position.

AWARD: The grievance fails. The arbitrator is satisfied that the job was filled in compliance with the seniority provisions in the collective agreement. It was also determined that the job duties were correct as posted, with no changes having been made to the job description. The Grievor misunderstood the full job duties because of the situation with the previous incumbent. The allegation that the Employer discriminated against the Grievor was found to be unsupported by any evidence.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (1984) 2nd (pp 315-316).

DECISION: 88-092

Halifax Infirmary Hospital AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606

Outhouse, Bruce - Arbitrator

Gordon Forsyth, for the Union
Terry Roane, for the Employer

September 22, 1988

ISSUES: Arbitrability - Agreement as primary source of jurisdiction 2:1200, - Subject-matter limitations 2:1100; Collective agreement - Matters arising outside of 2:1200; Discipline and discharge - Grounds for - Absence from work - Reasonable excuse 7:3112.

CIRCUMSTANCES: The Grievor alleges that the Employer has violated the collective agreement by denying the Grievor the option of taking a vacation day for a day on which she was prevented from reporting for work due to a snowstorm. This option is set out in the Employer's "Storm Policy". The Employer takes the position that the grievance is inarbitrable because the "Storm Policy" is entirely outside the collective agreement. Alternatively, the Employer argues that if the matter is found to be arbitrable, the policy has been fairly applied in the Grievor's case.

AWARD: The grievance is dismissed and declared to be inarbitrable. The collective agreement contains no reference to the "Storm Policy" nor does it make any provision for employees who miss work due to storms. This, then, is not a grievance but rather a case of inconsistent application of a policy throughout the bargaining unit.

AUTHORITIES: Re C.N. Telecommunications and C.N. Telecommunications Union - United Telegraph Workers', Local 43 (1976), 11 L.A.C. (2d) 152 (Rayner). Re Kitchener Beverages Ltd. and United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 173 (1976) 13 L.A.C. (2d) 283 (Brandt). Re Canadian Union of Public Employees, Local 1000, and Hydro-Electric Power Commission of Ontario (1966) 17 L.A.C. 244 (Thomas). Baril v. Attorney General of Canada et al (1979) 36 N.R. 587 (F.C.A.). Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Association (1980) 24 L.A.C. (2d) 319 (Christie). Re Thameswood Lodge and London and District Service Workers' Union, Local 220 (1984) 15 L.A.C. (3d) 228 (Verity). Nova Scotia Nurses' Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital (1982) 54 N.S.R. (2d) 289 (N.S.S.C., A,D.). Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees et al (1987) 62 O.R. (2d) 636 (Ont. Div. Ct.). Re McKellar General Hospital and Ontario Nurses' Association (1984) 15 L.A.C. (3d) 353 (Beatty). Re Wardair Canada Inc. and Canadian Air Line Flight

Attendants' Association (1987) 28 L.A.C. (3d) 142 (Beatty). Re Spar Aerospace Ltd. and United Automobile Workers, Local 112 (1983) 12 L.A.C. (3d) 97 (Brown).

DECISION: 88-093

Trenton Works Lavalin Inc. AND United Steelworkers of America, Local 1231

MacDougall, R. Lorne - Arbitrator

Keith Oleksiuk, for the Union
Bruce MacIntosh, for the Employer

September 26, 1988

ISSUES: Safety - Refusal to obey order 7:3621; Statutes - Applied by boards of arbitration 2:2100; Evidence - Burden of proof - Discipline 3:2411.

CIRCUMSTANCES: A group of employees were sent home until the Employer could correct unsafe working conditions. The Grievors argue that they exercised their right to refuse unsafe work, and were entitled to salary and benefits for the time between their refusal to work and their return to work following a Ministry order to return. The Employer argues that since both parties agreed to stop work, the Grievors' action constituted a work stoppage, not exercise of refusal to do unsafe work. Therefore the Grievors are only entitled to two hours pay for reporting to their shift.

AWARD: The grievance succeeds. The Grievors' claim is consistent with statutes governing refusal to work, and therefore they are entitled to the same wages and benefits they would have received had they not been sent home.

AUTHORITIES: Occupational Health and Safety Act, R.S.N.S. (1985) c. 3. Richard Arnold and Other Members of Local 127, U.A.W. International Harvester Bargaining Unit and International Harvester Company of Canada Limited, Chatham, Ontario, 1983 3 C.L.R.B.R. 336.

DECISION: 88-094

Halifax Infirmary Hospital AND Nova Scotia Nurses' Union, Halifax Infirmary Local

Darby, Peter E. - Chair; Larkin, Raymond; McDougall, Donald H.

Blaise MacDonald, for the Union
Eric Durnford, for the Employer

September 16, 1988

ISSUES: Bargaining unit - Employees excluded 5:1120, - Supervisors and foremen 5:1126; Jurisdiction - Sources - Submission to arbitration 2:1300; Interpretation - Words and phrases - Jobs and classifications - Classifications 5:2000 fn 12; Evidence - Admissibility - Relevance 3:4200.

CIRCUMSTANCES: The Grievor alleges the Employer has violated the collective agreement by failing to treat a new position in the Nursing Services Department as part of the bargaining unit. The Grievor maintains that the new position of Clinical Development Nurse (CDN) is a job classification encompassed by the position of Assistant Head Nurse and therefore within the bargaining unit. The Employer regards the position of Clinical Development Nurse as one involving the exercise of management functions and therefore outside of the bargaining unit. Evidence was presented regarding the development and adoption of the new position of CDN, plus the issue of management exclusion. Details of job responsibilities for some individuals in the CDN position were considered. Both the Grievor and the Employer had agreed to bypass the Labour Relations Board, which is the normal venue for decisions about managerial exclusions, in favour of this Arbitration Board.

AWARD: The grievance fails. The CDN is to be excluded from the bargaining unit from the date of her or his appointment. Evidence indicates several management functions are part of the CDN's responsibilities. Therefore, the position creates sufficient probability of conflict of interest to justify exclusion from the bargaining unit. Specifically, Nurse A is a CDN and is exercising management functions; the evidence and circumstances regarding Nurses B, C, D, E and F is less definitive, but they have been excluded as well.

DISSENT: (Larkin) Would allow the grievance regarding Nurses B, C, D, E and F and order the Employer to comply with the collective agreement in regard to them. Larkin agrees that Nurse A exercises management functions and is therefore excluded from the bargaining unit. However Larkin concludes Nurse A is a CDN who has been given additional management duties that the other Nurses have not.

AUTHORITIES: Trade Union Act, S.N.S. 1972, C. 19. Kentville Local of the Nova Scotia Nurses' Union and Kentville Hospital Association, [1978], 2 Can. L.R.B.R. 565. Adams, George W., Canadian Labour Law (1985), Canada Law Book, p. 265. The Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23, [1974], Can. L.R.B.R. 1, pp. 3-4. Ontario Nurses' Association and Oakwood Park Lodge, [1982], OLRB Rep. Jan. 84...pp. 92, 101-3. The Cottage Hospital (Uxbridge) and Ontario Nurses' Association, 1980, OLRB Rep. 304, pp. 305-6. United Steelworkers of America and McIntyre Porcupine Mines Limited, [1975], OLRB Rep. 161. The Town of Amherst and Amherst Police Association, Local 104 of the Police Association of Nova Scotia (1977) L.R.B. (N.S.) No. 2380, p. 3. Hydro-Electric Commission of the Borough of Etobicoke, [1981] OLRB Rep. 38, p. 46. Toronto East General Orthopaedic Hospital Inc. and Service Employees Union, Local 204 et al, [1975], 1 Can. L.R.B. Rep. 224. L.R.B. [N.S.] Order No. 1996. L.R.B. [N.S.] Order No. 2552. L.R.B. [N.S.] Order No. 2846.

DECISION: 88-095

Adix Contractors AND International Brotherhood of Electrical Workers, Local 625

DeMont, Eric G. - Arbitrator

Fern Tardif, for the Union
n/a, for the Employer

October 4, 1988

ISSUES: Work assignment - Contracting out - Employees outside unit 5:1400; Evidence - Types of evidence - Extrinsic evidence - Trade usage 4:2250; Pension plans - Benefits 4:1400.

CIRCUMSTANCES: The Grievor is claiming two sums of money from the Employer. The first claim is for non-payment of Board Allowance, Health and Welfare, Pension, and Industry Improvement and Recreation Allowances. The second claim represents compensation lost to the Grievor when the Employer hired non-union persons for electrical work which should have been done by the Grievor. The Employer had signed a Voluntary Recognition Agreement with the Grievor, recognizing the Grievor as the exclusive bargaining unit for all work in question. However, some work was carried out by non-union persons as witnessed by the Grievor. In addition, certain allowances and benefits were not paid to the Grievor for work completed.

AWARD: The grievance succeeds. The Employer is ordered to pay to the Grievor the allowances for Health and Welfare, Pension, and Industry Improvement Fund, plus the Board Allowance. The arbitrator found clear evidence that electrical work was performed by non-union persons, contrary to their Agreement. The Employer is ordered to pay the Grievor for the hours of work plus benefits.

AUTHORITIES: Nova Scotia Department of Labour Trade Regulations. Apprenticeship and Tradesman's Qualifications Act, defining the Electrical Construction Trade.

DECISION: 88-096

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781

Outhouse, Bruce - Arbitrator

Bernie Boudreau, for the Union
Bob Street, for the Employer

October 11, 1988

ISSUES: Wages - Alteration of wages 8:1400; Union - Recognition 9:1100; Arbitrability - Procedural limitations - Exhaustion of grievance procedure 2:3128; Estoppel 2:2210.

CIRCUMSTANCES: The Grievor alleges that the Employer has violated the collective agreement by failing to pay the twelve month employees their appropriate salary entitlement. This dispute was created by the conversion from annual salaries to hourly wage rates, and the method of calculating that conversion. The Grievor requests the Employer to compensate each twelve month employee for one additional working day for each of the years 1985, 1986, and 1987. The Employer denies any breach of the collective agreement and argues the twelve month employees have been paid exactly their entitlement, based on a 260 working day calendar year. In addition the Employer maintains the Grievor cannot file a grievance for the years 1985 and 1986 because the time-limit for filing has expired.

AWARD: The grievance succeeds. The collective agreement indicates wages have been set for the twelve month employees in the form of an hourly rate, not an annual salary. In addition, the grievance is of an ongoing nature and not subject to a time-limit. The Employer is directed to compensate the twelve month employees for the hours they actually worked in the years 1985, 1986, and 1987. In future, compensation shall be calculated on the basis of 261 working days per calendar year, barring unpaid absences.

AUTHORITIES: Re McKechnie Ambulance Service Inc. and Ontario Public Service Employees' Union, Local 347 (1987) 27 L.A.C. (3d) 385 (Verity). Re Vancouver Police Board and Vancouver Police Union (1987) 32 L.A.C. (3d) 214 (Hope). Re Government of Province of British Columbia and British Columbia Government Employees' Union (1987) 30 L.A.C. (3d) 287 (Hope). Re City of Lethbridge and Canadian Union of Public Employees, Local 70 (1986) 26 L.A.C. (3d) 81 (England). Re Domglas Ltd. and United Glass and Ceramic Workers, Local 203 (1980) 26 L.A.C. (2d) 94 (Burkett).

DECISION: 88-097

Lord Nelson Hotel Ltd. AND Hotel Employees and Restaurant Employees' Union, Local 662

MacLellan, J.A. - Chair; McDougall, Donald; Bell, J.K.

Raymond Larkin, for the Union
Maureen Reid, for the Employer

October 11,1988

ISSUES: Discipline and discharge - Grounds for - Fighting or threatening 7:3430; Disciplinary penalties - Reasonableness 7:4300, - Progressive discipline 7:4422 .

CIRCUMSTANCES: The Grievor was dismissed for fighting with a fellow employee at a party the Grievor had organized. The fight began at the party and was continued outside, in a parking lot at the place of employment. The Grievor alleges he was terminated without just cause and requests reinstatement with all benefits lost as a result of the dismissal. The Employer maintains the termination is justified by the extreme circumstance of the Grievor's continuing the fight unnecessarily, and by the spectacle's potential to damage the Employer's reputation.

AWARD: The grievance fails. The Board ruled that the penalty of discharge was not too severe given the circumstances of the continuation of the fight, plus the potential damage to the Employer's reputation. The Board feels the Grievor has made a serious error in judgement, but has the potential to do well elsewhere with another employer.

DISSENT: Bell disagrees with the assessment of the fighting situation as extreme. He also maintains there is no tangible evidence that the Employer's reputation was harmed. Bell recommends reinstatement of the Grievor to his former position.

DECISION: 88-098

Stora Forest Industries Ltd. AND Canadian Paperworkers' Union,
Causeway Local No. 972

Cromwell, T.A. - Arbitrator

Dennis Grant, for the Union
Eric B. Durnford, for the Employer

September 28, 1988

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610; Disciplinary penalties - Mitigating factors 7:4400 - Provocation 7:4412, - Employees state of mind - Isolated incident 7:3542, - Failure to warn - Work performance 7:3542, - Progressive discipline 7:4422, - Reasonableness 7:4300; Remedies - Authority to award - Substitution of penalty 2:1470.

CIRCUMSTANCES: The Grievor was suspended for three days for allegedly refusing to be checked during a safety and housekeeping inspection. The Grievor works in a potentially dangerous operation in which safety must be a very high priority for both the Company and the Union. Safety inspections are conducted three times per year on a random basis. The Union agrees there are grounds for discipline, but feels the discipline is too severe. The Employer's position is it had just cause for the imposition of discipline and that the penalty was just and reasonable in the circumstances.

AWARD: The grievance succeeds to the extent that the three day suspension is vacated and a one-day suspension is substituted along with the resulting compensation and restoration of seniority to the Grievor. The Arbitrator found that the Employer did have cause to impose discipline on the Grievor, but the penalty was unreasonable for several reasons. The Grievor has a very good work record and has previously co-operated with safety inspections. The employee conducting the inspection is neither a foreman nor a supervisor, and the Employer was in error applying discipline to the Grievor. In addition, the Grievor and the inspector had been involved in an antagonistic "joking" session immediately prior to the attempted inspection, and this may have affected the Grievor's attitude. Finally, the Employer failed to give consideration to the principle of progressive discipline which is covered in the collective agreement. In light of the circumstances and the fact that this is a first offense for the Grievor, a lesser discipline is appropriate.

AUTHORITIES: Trade Union Act, s. 41(1). Re Iron Ore Co. of Canada and United Steelworkers (1977) 14 L.A.C. (2d) 268. Nova Scotia Teachers' Union and the Halifax County Bedford District School Board, (undated, hearing held on April 21, 1983).

DECISION: 88-099

Cove Guest Home AND Canadian Brotherhood of Railway, Transport and General Workers

Scaravelli, N.M. - Arbitrator

Victor Tomiczek, for the Union
Warren MacDonald, for the Employer

October 25, 1988

ISSUES: Working hours and shifts 5:3100; Lay-Off - Reduction of hours 6:2210, - Seniority - Applied 6:2000; Interpretation - Words and phrases - Lay-Off 6:2200.

CIRCUMSTANCES: The Grievor, a full-time dietary aide, had her hours reduced by half although she was still working the same number of shifts. The Union argues this reduction of the Grievor's hours constitutes a lay-off which breaches the seniority provisions of the collective agreement. In addition, the Union maintains the Grievor is entitled to work a 40-hour week and that her hours cannot be unilaterally reduced without agreement between the parties. The Employer responds that the normal hours of work provision in the collective agreement is not a guarantee of employment and there is no language preventing management from altering or reducing work hours. The Employer also argues the reduction of the Grievor's hours does not constitute a lay-off.

AWARD: The grievance succeeds and the Grievor is to be compensated accordingly. The Board concluded that the singling out of one employee for reduction of hours in the circumstances constituted a lay-off. It was determined that although the Employer does have the authority to reduce hours, it must be reasonable, in good faith and not in a manner that would constitute a lay-off violating seniority rights.

AUTHORITIES: Re UAW, Local 458 and Cockshutt Farm Equipment Limited (1959) 9 L.A.C. 324. Brown and Beatty, Canadian Labour Arbitration (2nd. ed.) p. 279. Air-Care Limited Ltd. v. U.S.W. of America (1974) 49 D.L.R. (3d) 467. Re Charlotte Eleanor Inglehart Hospital and Service Employees Union, Lct 210 (1980) 25 L.A.C. (2d) 25.

DECISION: 88-100

Halifax (City) AND Halifax Civic Workers' Union, Local 108

Christie, Innis - Chair; Fisher, David; McDougall, Donald H.

Bruce Evans, for the Union
Michael Dunphy, for the Employer

October 12,1988

ISSUES: Discharge and discipline - Grounds for - Theft 7:3310; Evidence - Burden of proof - Applications - Discipline 7:2300, 3:2411; Disciplinary penalties - Mitigating factors 7:4400, - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor, who has been with the Employer for more than 20 years, was dismissed for allegedly stealing a box of new light bulbs. The Grievor says he was told by the janitor that the bulbs were not new and that he could take them home. The Grievor alleges suspension and discharge without just cause and requests he be reinstated and compensated for all lost pay and benefits, plus any record of the incident be removed from his personal file.

AWARD: The grievance fails. The Board is satisfied the Employer has discharged the burden of proof that the Grievor committed theft by taking the box of new light bulbs for his personal use. In addition, no lesser discipline should be substituted for discharge despite the Grievor's long service because the theft was more than nominal value and was not "spur of the moment".

AUTHORITIES: Air Canada (1978) 17 L.A.C. (2d) 337 (Christie). Brown and Beatty, Canadian Labour Arbitration (2d ed. 1984) para. 7:2500, fn. 86; 7:3314. Continental Insurance Company v. Dalton Cartage Co. Limited (1982) 131 D.L.R. (3d) 559, per Chief Justice Laskin, at p. 56. R. v. Oakes (1986) 26 D.L.R. (4th) 200, per Chief Justice Dickson, at p. 226. Great Atlantic and Pacific Co. of Canada (1983) 10 L.A.C. (3d) 199 (Kruger). Nova Scotia Liquor Commission (1974) 5 L.A.C. (2d) 117 (Richard). Langley Memorial Hospital (1985) 18 L.A.C. (3d) 123 (Thompson). Weiser, Inc. (1986) 23 L.A.C. (3d) 331 (Greyell). DuPont Canada Inc. Kingston Works (1983) 10 L.A.C. (3d) 424 (Swan, Chair).

DECISION: 88-101

National Sea Products Ltd. AND Canadian Seafood and Allied Workers' Union

MacLellan, J.A. - Arbitrator

Ronald Pink, for the Union
David E. Reid, for the Employer

October 17, 1988

ISSUES: Discipline and discharge - Grounds for - Leaving work without permission 7:3130; Disciplinary penalties - Mitigating factors - Employees state of mind - Isolated instance 7:3542, - Reasonableness 7:4300; Remedies - Authority to award - Substitution of penalty 2:1470.

CIRCUMSTANCES: The Grievor asked his supervisor for a couple of hours off work. When refused permission, the Grievor left the plant and did not return for the balance of the shift. As a result, the Grievor was suspended for five working days. The Union does not dispute that the Grievor was in violation of the rules, but feels that the amount of discipline was unjustified. The Grievor seeks elimination of the five day suspension and reimbursement of lost wages. The Employer testified that he would have liked to accommodate the Grievor's request, but could not because other employees were off sick and the Grievor could not be easily replaced at that time. There was no argument between the Employer and the Grievor at the time, just a discussion during which the Employer warned the Grievor he would be disciplined if he left the plant site.

AWARD: The grievance succeeds. Although the Grievor left the work site without permission, the collective agreement states the penalty for a first offense in this situation is a white warning slip. Therefore, the five day suspension is to be replaced with a first white warning slip to be placed in the Grievor's file. The Arbitrator adds there could be similar situations that could involve more serious discipline, but not in this case.

DECISION: 88-102

Zutphen Brothers/Zutphen Brothers Construction Ltd. AND Assn. of Bridge, Structural and Ornamental Iron Workers, Local 752

MacDougall, R. Lorne - Arbitrator

Gordon Forsyth, for the Union
Jan Silliker, for the Employer

October 27, 1988

ISSUES: Evidence - Burden of proof - Applications - Call-In pay 3:2418; Call-In pay 8:3400, - Burden of proof 3:2418 - Purpose 8:3410; Interpretation 4:2100.

CIRCUMSTANCES: The weather prevented the Grievors from working and they waited in a shelter for about an hour before asking their supervisor's advice as to what they should do. The supervisor was non-commital and the Grievors left the work site and went home. The Grievors claim two hours pay for reporting to work. The Employer argues that the supervisor's comment did not constitute a release, and according to the collective agreement the Grievors were bound to stay at the work site for two hours in order to qualify for reporting pay.

AWARD: The grievance fails. The collective agreement states that the employee is entitled to reporting pay provided he remains on the project for two hours or is released by the Employer. The evidence indicates that the supervisor's comment did not constitute a release, nor did the Grievors remain at the work site for the required two hours.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2d) p. 648. Re Canadian Food Workers, Local 1105 and Canada Packers Ltd. (1970) 21 L.A.C. 12.

DECISION: 88-103

Sydney Steel Corp. AND United Steelworkers of America, Local 1064

MacLellan, J.A. - Arbitrator

Andy Gillis, for the Union
Karin McCaskill, for the Employer

October 26, 1988

ISSUES: Overtime - Scheduling 5:3100; Working hours and shifts - Definition of - Work day defined 4:2100, - Work week defined 4:2100; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430; Interpretation - Words and phrases - Jobs and classifications - Classifications - 5:2000 fn12.

CIRCUMSTANCES: The Employer discontinued paying the overtime rate for Sundays for Pipe Shop employees working in the Water Treatment Plant. The Union maintains these employees have always been paid the overtime rate for Sundays in the past, and the the Employer should continue to do so. The Union also states that the water treatment duties are just an additional chore for the Grievors and they are really doing the same job they performed in the Pipe Shop. The Employer argues that the job performed in the Water Treatment Plant by the Grievors is different from their Pipe Shop duties, and is really a new position. Employees of the Water Treatment Plant follow a 21-shift schedule and are not entitled to overtime pay for work on Sundays.

AWARD: The grievance fails. The Grievors are not entitled to be paid the overtime rate when they are scheduled to work their regular shift on Sunday. The evidence indicates that the job is a new one and for the purposes of overtime the Grievors now work out of the Water Treatment Plant and not the Pipe Shop. With this different job function, they do not qualify for the Sunday overtime rate.

DECISION: 88-104

Cove Guest Home AND Canadian Brotherhood of Railway, Transport and General Workers, Local 620

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
Warren MacDonald, for the Employer

October 27, 1988

ISSUES: Strikes and lockouts - Unlawful strikes - Discipline 9:2410; Discipline and discharge - Grounds for - Leaving work without permission 7:3130; Disciplinary penalties - Mitigating factors - Discrimination 7:4414; Remedies - Authority to award - Substitution of penalty 2:1470.

CIRCUMSTANCES: The Grievors (16 in number) were suspended for either leaving or failing to return to their place of employment. Their supervisor went to the Grievors' work area in a nursing home kitchen and found the area had been left unattended, with items boiling on the stove and food in the oven. The Grievors had all left the kitchen, saying it was too hot to work, and did not return for 2.5 hours. The Grievors argue that the suspensions should be removed because they were justified for leaving the kitchen because of the heat.

AWARD: The grievance fails. The Grievors conducted an illegal walk-out, in serious breach of the collective agreement. In addition, the walk-out created several potentially dangerous situations by leaving the kitchen unattended and not providing the residents with their noon meal. The Arbitrator feels the discipline was, in fact, very lenient and will not change or alter the suspensions imposed except in one case. One Grievor received a five day suspension because she is president of the union local. The Arbitrator finds her suspension should be the same as the others and therefore reduces it from five days to one day.

DECISION: 88-105

Good People Sea and Shore Services Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 230

MacDonald, D.J. - Arbitrator

Victor Tomiczek, for the Union
Eric Durnford, Bernard Miller, for the Employer

October 12, 1988

ISSUES: Evidence - Burden of proof - Applications - Illness - Return to work 8:3342, - Types of evidence - Extrinsic evidence 3:4400; Seniority - Applications - Recall 6:2354.

CIRCUMSTANCES: The Grievor was laid off in January, 1987 due to a lack of work. In February, 1987 the Employer recalled the Grievor, who told them he was injured and would contact the Employer when he was able to return to work. In August, 1987 the Grievor informed the Employer he was ready to come back to work; at this time the Employer told the Grievor there was no work available, and in addition, he would require a doctor's certificate before returning to work. On October 8, 1987 the Grievor provided a medical slip. In November the Grievor filed a grievance seeking reinstatement in his proper position of the seniority list plus compensation for any lost wages and benefits. The Grievor contended he was ready and able to return to work in October; that work was available to him, and that such work was being performed by employees junior to him. The Employer agrees that recall is on the basis of seniority, but maintains the Grievor had failed to provide satisfactory proof that he was medically fit to perform his job.

AWARD: The grievance fails. The Employer's demand for medical confirmation of the Grievor's fitness to return to work is reasonable in the circumstances. The first doctor's slip the Grievor provided was not sufficient, and when requested for a second one, the Grievor did not co-operate. Therefore, the Grievor has failed to satisfy the onus of providing proof of his medical fitness as required.

AUTHORITIES: Re Firestone Tire and Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113 (1973) 3 L.A.C. (3d) p. 12. Re U.A.W., Local 89, and Reflex Corp. of Canada Ltd. (Weatherill), referred to in Re U.A.W., Local 27, and Eaton Automotive Canada Ltd. (1969) 20 L.A.C. 218 at p. 220 (Palmer). Nova Scotia Nurses' Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital (S.C.A. No. 00989), McKeigan C.J.N.S. 54 N.S.R., (2d) p. 289. Brown and Beatty, pp. 525-8. Re United Brewer Workers and Molson's Brewery (1961) 23 L.A.C. 381 (Laskin). R. v. Board of Arbitration et p. United Steelworkers, [1970] 1 O.R. 99 (Ont. H.C., Pennell, J.). Cape Breton Development Corporation and United Mine Workers of America, District 26, unreported, February 2, 1988.

DECISION: 88-106

Good People Sea and Shore Services Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 230

MacDonald, D.J. - Arbitrator

Victor Tomiczek, for the Union
Eric Durnford, for the Employer

October 28, 1988

ISSUES: Work assignment - Contracting out - Employees outside unit 5:1400; Collective agreement - Matters arising outside of 2:1200; Interpretation - Words and phrases - Bargaining unit work 5:1200, - Emergencies and unanticipated happenings - Abnormal or special conditions 5:3100; Seniority - Applications - Lay-Off 6:2200.

CIRCUMSTANCES: The Grievor claims lost wages for work performed by non-bargaining unit employees while the Grievor was on lay-off. In addition, the Grievor claims two employees with less seniority were recalled before he was. The Employer argues that this was a very unusual situation in which a customer requested use of a boat cradle to temporarily store his fishing vessel. The Employer agreed, because he was a good customer, and was experiencing personal difficulties which required him to quickly store his boat and return home to Quebec. This was an agreement made for compassionate, not commercial, reasons and the customer assumed responsibility for hiring other workers to prepare the boat cradle for his use. The Employer did not get involved in any way.

AWARD: The grievance fails. The Arbitrator found the Employer's judgement questionable in allowing the customer to hire non-bargaining unit employees, regardless of the Employer's good intentions. However, there is no evidence to conclude the Grievor would have been recalled to work even if the Employer had undertaken the preparation of the boat cradle. There is also no evidence to support the Grievor's contention that bargaining unit employees junior to the Grievor were working at the time of the grievance.

AUTHORITIES: Atomic Energy of Canada Limited and Oil, Chemical and Atomic Workers' International Union (unreported). Re Ontario Steel Products Co. Ltd. and United Automobile Workers, Local 127, 3 L.A.C. (2D) 137.

DECISION: 88-107

Dalhousie University AND Dalhousie Faculty Assn.

Outhouse, Bruce - Arbitrator

Kim Turner, for the Union
Eric Durnford, for the Employer

November 7, 1988

ISSUES: Collective agreement - Matters arising outside of - 2:1200; Management rights 4:2300; Interpretation - Words and phrases - Collective agreement 4:1100; Remedies - Authority to award 2:1400.

CIRCUMSTANCES: The Grievor applied for a position as a tenure-track professor. She was instead appointed to a two-year probationary period after which she would be eligible for appointment to a tenure-track position. The Union contends this appointment violates the collective agreement and requests that the Grievor be appointed to a three-year probationary tenure-track position. The Employer denies any violation of the collective agreement and upholds its right to make a different appointment than that recommended by the hiring committee.

AWARD: The grievance succeeds. The Employer has breached the collective agreement by devising an appointment which is outside the categories enumerated within the agreement. The Grievor's engagement is changed to a three year tenure-track probationary appointment from the disallowed two-year appointment.

DECISION: 88-108

Seaview Manor Corp. AND Canadian Union of Public Employees, Local 2094

MacDougall, R. Lorne - Arbitrator

James Crosby, for the Union
Reeves Matheson, for the Employer

November 14, 1988

ISSUES: Job classification and descriptions - Creation or revision 5:2000, - Change of work load/job function 5:2410; Interpretation - Words and phrases - Collective agreement 4:1100; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430.

CIRCUMSTANCES: The Grievors are housekeeping employees at a nursing home. They allege the Employer has ordered them to feed meals to certain residents of the Home; they claim this is a violation of the collective agreement. The Grievors' concerns are threefold: they are not qualified to feed patients and would not know how to react in emergency situations; that duty is not in their job descriptions; and it has historically not been part of their job duties. The Employer maintains that job descriptions are not part of the collective agreement and therefore no violation has taken place. There is a general duties clause in the collective agreement that states employees may be required to perform work outside their regular duties. In addition, several housekeeping employees have been feeding the patients willingly and those employees who are reluctant are not forced to feed patients.

AWARD: The grievance succeeds. The feeding of patients is the duty of other departments and housekeeping staff can only be requested to do this work from time to time or on a substitutional basis.

AUTHORITIES: Palmer, E.E., Collective Agreement Arbitration in Canada (2d) pp. 126-131, 138. Webster's New World Dictionary (2d College Edition).

DECISION: 88-109

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867, Unit V

Cromwell, T.A. - Chair; Powell, E.A.; North, G.I.

Thomas Pittman, for the Union
Jonathan Davies, for the Employer

October 31, 1988

ISSUES: Recall 6:2354; Seniority - Applications - Recall 6:2000; Lay-Off - Seniority - Applied 6:2200; Time-Limits - Delay 2:3210; Evidence - Types of Evidence - Extrinsic Evidence - Past Practice 3:4430.

CIRCUMSTANCES: The Grievor works for the Employer during the winter snow removal season and usually finds other work during the rest of the year. In the year in dispute, the Grievor asked for and was granted summer work, and was laid off after a few months. The Grievor alleges the Employer failed to recall him when he was the senior employee entitled to such recall, and subsequently laid him off prior to another more junior employee. The Employer maintains there is no violation of the collective agreement. The seasonal nature of the work has required an informal method of recall which has worked very well in the past with no complaints from the Union.

AWARD: The grievance fails. The Grievor had not previously indicated any interest in summer work, and the Employer was following well established practice by not recalling him when summer work was available.

DISSENT: Powell believes the Employer did not properly recall the Grievor and therefore violated the collective agreement. The Grievor should be reinstated to the level of seniority to which he would be entitled had proper recall been made.

AUTHORITIES: Re Canadian Broadcasting Corporation and National Association of Broadcast Employees and Technicians (1955), 18 L.A.C. (3d) 276. Re C.B.R.T. and G.W., Local 612 and Crossley Karastan Carpet Mills Limited (unreported award dated 15 March 1983). Re Tung-Sol of Canada Limited (1964) 15 L.A.C. 161 (Reville) at p. 162. Re United Brewery Workers, Local 304 and O'Keefe Brewing Co. Limited (1964) 14 L.A.C. 324 (Little). Re United Brewery Workers, Local 173 and Carling Breweries Ltd. (1964) 15 L.A.C. 1 (Laskin). Brown and Beatty 3:2415 at p. 132.

DECISION: 88-110

National Gypsum (Canada) Ltd. AND International Union of Operating Engineers, Local 721

Kydd, William - Arbitrator

Gordon N. Forsyth, for the Union
Michael Dunphy, for the Employer

October 31, 1988

ISSUES: Discipline and discharge - Grounds for - Absence from work - Failure to notify employer 7:3110; Disciplinary penalties - Culminating incident 7:4310, - Progressive discipline 7:4422; Evidence - Admissibility - Relevance 3:4200.

CIRCUMSTANCES: The Grievor alleges he was unjustly terminated from his employment when he took one extra week of vacation, believing he had his Employer's consent. The Employer asserted he had not given the Grievor permission for an extra week of leave, and the Grievor had not obtained a leave of absence. The Employer maintains the Grievor failed to follow company policy regarding absence from work on this and several other occasions. This was a culminating incident after several warnings leading to the Grievor's discharge.

AWARD: The grievance fails. The Board found that the Grievor knew he did not have the required permission to take an extra week of vacation as he did not obtain a signed leave of absence form. The Grievor was aware of the rules and knew he was breaking them, and he had been warned about similar conduct on previous occasions.

AUTHORITIES: Re Sunnybrook Hospital and Sunnybrook Hospitals Employees' Union, Local 777 (1987) 32 L.A.C. (3d) 381. Re U.S.W. and Aerocide Dispensers Ltd. (1965) 15 L.A.C. 416, at pp. 426-7. Re International Woodworkers of America, Local 2-500 and Stancor Central Ltd. (1970) 22 L.A.C. 184 (Weiles). Re CN/CP Telecommunications and Canadian Telecommunications Union (1981) 4 L.A.C. 205 (Beatty), affirmed (1981), 128 D.L.R. (3d) 236. Re Douglas College Technical and Vocational Institute and B.C. Government Employees' Union, Local 62 (1977) 16 L.A.C. (2d) 139 (Munroe). Re Indal Products Ltd. and United Steelworkers, Local 2729 (1975) L.A.C. 2729 (Weatherill). Re Black Diamond Cheese and Canadian Food and Allied Workers, Local P-688 (1973), 3 L.A.C. (2) 151 (Brandt). Re U.S.W. and Lake Ontario Steel Co. Ltd. (1968) 19 L.A.C. 103 (Weiler) [at pp. 107-88, quoting from Ford Motor Co., 3 L.A. 779]. K.V.P. Co. Ltd. (1965) 16 L.A.C. 73 (Robinson).

DECISION: 88-111

Metropolitan Authority (Metro Transit Division) AND Amalgamated Transit Union, Local 508

DeMont, Eric G. - Arbitrator

Kimberly Turner, for the Union
Amery Boyer, for the Employer

November 17, 1988

ISSUES: Collective agreement - Matters arising outside of 2:1200; Estoppel 2:2210, 2:2200; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430.

CIRCUMSTANCES: The Union contends the Employer has violated the collective agreement by requiring certain employees to have a motor vehicle available for use by the employees, subject to a payment for mileage. They feel this policy puts a financial burden on the employees which effectively reduces the employees' rate of pay. The Employer's position is there is nothing in the collective agreement dealing with the requirement that certain employees have a car available. The policy therefore does not conflict with the collective agreement and cannot be grievable.

AWARD: The grievance succeeds in part. The Board found the Employer is in breach of the terms of the collective agreement by requiring that, as a condition of employment the employees have their own motor vehicles available. However, the Union is estopped from attempting to enforce its right in this regard during the currency of the collective agreement.

AUTHORITIES: Re Nova Scotia Civil Service Commission, 24 L.A.C. (2d) 319, (Christie). Civil Service Act. Re Maison Mere, 3 L.A.C. (2d) 392. Re C.B.R.T. and G.W. and the Halifax Infirmary, Decision of Outhouse, September 7, 1988. Re Canada Packers, 5 L.A.C. (3d) 123. Re T.D. Chaisson Electric, 29 L.A.C. (2d) 268; Re Gray Forging, 20 L.A.C. (2d) 278. Re DeHaviland Aircraft, 24 L.A.C. (3d) 353. Re United Rubberworkers, 19 L.A.C., 51. Re Consolidated Bathurst, 28 L.A.C. (2d) 230. Re Certified Brakes, 25 L.A.C., (3d) page 418. Re Domglas Inc., 9 L.A.C. (3d) p. 125. Re Consolidated Bathurst, 6 L.A.C. (3d) p. 30. Re Consumer's Glass, 13 L.A.C. (3d) p. 351.

DECISION: 88-112

Eastland Chrysler Plymouth Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 506

Scaravelli, N.M. - Arbitrator

Victor Tomiczek, for the Union
George S. Khattar, for the Employer

November 21, 1988

ISSUES: Vacation 8:3210, - Computation of vacation and vacation pay 8:3230; Interpretation - Definitions 4:2100.

CIRCUMSTANCES: Grievor A was involved in an accident and subsequently off work for more than a year. During that time, he received long-term disability benefits but was denied vacation and/or vacation pay. The Grievor claims this is in violation of the collective agreement. Grievor B was laid off for nearly a year due to loss of his driver's licence which was required for his employment. He was also denied paid vacation which he claims is in violation of the collective agreement. The Union argues that an employee with more than one year's service is entitled to vacation with pay regardless of whether the employee had been laid off or absent due to illness during that year. The Employer argues that the proper interpretation of the collective agreement is that vacation days must be earned and be computed on the basis of actual days worked by the employee.

AWARD: The grievance succeeds. The Employer's argument that vacation must be based on actual time worked would be to change the language in the collective agreement. Grievor A continued to be an employee during the period he was off due to disability, and is entitled to his regular vacation pay. Grievor B remained an employee during his period of lay-off and is also entitled to his vacation pay. The Employer is ordered to pay the appropriate vacation pay to each Grievor.

AUTHORITIES: Ron May Pontiac-Buick GMC Limited and Canadian Brotherhood of Railway, Transport and General Workers, Local 506. Brown and Beatty, Canadian Labour Arbitration (2nd ed.) pp. 587-8. Re Air Canada and Canadian Airline Employees' Association (1976) 13 L.A.C. (2d) 225. Re Union Gas Limited and Oil, Chemical and Atomic Workers' International Union, Local 9-758 (1980) 27 L.A.C. (2d) 72. Re Sola Basic Limited and International Association of Machinists, Local Lodge 1168 (1976) 11 L.A.C. (2d) 328.

DECISION: 88-113

Lunenburg (Town) AND Lunenburg Police Assn.

MacDougall, R. Lorne - Chair; Johnston, Brian G.; MacDougall, Charles A.

David W. Fisher, for the Union
Jan Silliker, for the Employer

October 31, 1988

ISSUES: Collective agreement - Matters arising outside of 2:1200; Evidence - Burden of proof 3:2400, - Types of evidence - Extrinsic evidence - Past practice 3:4430; Overtime - Defining overtime - Daily overtime 8:2100; Call-In pay - Purpose 8:3410.

CIRCUMSTANCES: The Grievor had been requested by the Employer to take a one-day course. The Grievor refused because he was taking one day vacation on that day. The Employer ordered the Grievor to take the course, which he did, cancelling his vacation day. The Grievor claims that, as he was ordered by the Employer to attend the course, he is entitled to receive overtime pay for the time he spent in the course. The Employer's position is that training is not considered to be work in the provisions of the collective agreement, regardless of whether the employee is ordered to take a specific course. Furthermore, long practice has been that no special pay is given for taking courses.

AWARD: The grievance fails. The collective agreement has no provision for special pay or compensation for members taking courses and the Employer has not paid for time spent in courses in the past. The Grievor has no right to claim overtime or call-out pay under these circumstances.

DISSENT: MacDougall argues that if the Employer uses a residual right to force employees to take courses, then the Employer must pay for such courses for any employee who works a 12-hours shift and who is called upon to continue working by taking a course.

AUTHORITIES: Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 1065 (1978) 20 L.A.C. (2d) 118. Nova Scotia Civil Service Commission and the Nova Scotia Government Employees' Association [unreported, February 10, 1982]. Palmer, E.E., Supplement to Collective Agreement Arbitration in Canada (1980) p. 103. Re Dominion Stores, 20 L.A.C. (2d) 118 (Teed, 1978 - N.B.). Re Canadian Union of Public Employees, Local 1 and Toronto Electric Commissioners (1968) 20 L.A.C. 19. Re Canadian National Railway Company et al and Beatty et al (1981) 128 D.L.R. (3d) 236. Combe v. Combe [1951] 1 All E.R. 767 at p. 770. Re City of Lethbridge and Canadian Union of Public Employees, Local 70 (1986) 26 L.A.C. (3d) p. 91 and 92. Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association (1984) 14 L.A.C. (3d) 46, p. 58. Re Domglas Ltd. and United Glass and Ceramic Workers, Local 203 (1980) 26 L.A.C. (2d) 94 (Burkett).

NOTE: Johnston agrees with the Board's decision and adds that the reason the grievance failed is that the collective agreement does not provide for payment for employees who attend courses. He adds that the fact the Employer is not obliged to pay for a course does not give the employee the right to refuse to comply with the Employer's directive.

SEE ALSO:89-101

DECISION: 88-114

Metropolitan Authority AND Amalgamated Transit Union, Local 508

Cotter, W. Brent, Chair; Johnston, Brian G.; Stockton, Ron

Kimberly H.W. Turner, for the Union
Terry L. Roane, for the Employer

November 15, 1988

ISSUES: Resignation 7:7100; Discipline and discharge - Evidence - Burden of proof 3:2411.

CIRCUMSTANCES: The Grievor is a bus driver who resigned from her position after her physician advised her to seek other employment due to a work-related injury. The Grievor did not explore any alternatives such as eligibility for long-term disability before submitting her resignation. After discussion with her union representative, the Grievor attempted to have her resignation withdrawn on the basis she had not been well-informed about her options. The Employer maintains the resignation was a voluntary one and therefore valid and refuses to allow its withdrawal. The Union alleges the Employer's refusal to accept the withdrawal of the resignation constitutes an unjust dismissal. They ask that the Grievor be reinstated to her position without any loss of benefits or seniority.

AWARD: The grievance fails. The Board found the Grievor was not dismissed, but had resigned. Furthermore, there was no basis for setting aside the Grievor's resignation despite the Union's contention the Grievor had not been well informed about her options.

AUTHORITIES: Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees' Union (1987) 27 L.C.C. (2d) 120 at pp. 131-3. Re Civil Service Commission and Nova Scotia Government Employees' Union (unreported, December 18, 1981). Re Anchor Cap and Closure Corp. of Canada, Ltd. and United Electrical Radio and Machine Workers of America, Local 512 (1949), 1 L.A.C. 222 (Finkelman). Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1978) 18 L.A.C. (2d) 7 at p. 13. Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) p. 512. Re Canada Packers Inc. and United Food and Commercial Workers, Local 114-P (1985) 17 L.A.C. (3d) 1 (Rayner). Re Cascade Construction Ltd. and United Brotherhood of Carpenters and Joiners, Local 2410 (1987) L.A.C. (3d) 108 (Beattie). Re Clarke Institute of Psychiatry and Ontario Nurses' Association (1985) 20 L.A.C. (3d) 193 (Knopf). Re Toronto Western Hospital and Canadian Union of Public Employees, Local 1744 (1985) 19 L.A.C. (3d) 191 (Picher). Re Hickeson-Longs Supply Co. and Teamsters' Union, Local 419 (1985) 19 L.A.C. (3d) 379 (Burkett). Re Weetabix of Canada (Mfg.) Ltd. and United Food and Commercial Workers, Locals 1230-2 and 1230-8 (1988) 31 L.A.C. (3d) 444 (Draper). Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79 (1986) 24 L.A.C. (3d) 115 (Jolliffe). Re Oshawa General Hospital and Ontario Nurses' Association (1983) 33 L.A.C. (3d) 78 Brown.

NOTE: Johnston does not believe the Grievor was not aware of her options. The long-term disability plan had been in effect for ten years and was regularly publicized.

DECISION: 88-115

Northside-Victoria District School Board AND Canadian Union of Public Employees, Local 981

MacDonald, David J. - Arbitrator

Gerald Yetman, for the Union
Eric Durnford, for the Employer

November 14, 1988

ISSUES: Employee - Defined 5:1122; Work assignment - Bargaining unit work 5:1200, - Contracting out 5:1300, - Employees outside unit 5:1400; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430.

CIRCUMSTANCES: The Grievor assumed a temporary full-time position as regular bus driver, temporarily leaving his positions as permanent part-time cleaner (union position) and spare bus driver (non-union position). After four months, the temporary bus driver position ended and the Grievor was assigned ten days of spare bus driver duties. After the Grievor's ten-day shift, the spare bus driver duties were then assigned to another spare bus driver. The Union argues that the Grievor had accumulated sufficient work hours to be considered a regular (permanent) bus driver and should not have been replaced by a spare driver. The Employer asserts the Grievor completed his duties as temporary driver after four months, then returned to his former position of part-time cleaner and spare bus driver. The ten-day shift was assigned to the Grievor in his capacity as spare bus driver. All spare bus driver shifts are assigned on a rotating basis to maintain the necessary pool of non-union spare drivers.

AWARD: The grievance fails. The Grievor had been assigned to the permanent position on a temporary basis only. There was no indication the Grievor would become a permanent regular driver as a result of this, and therefore the Union's contention is unfounded.

AUTHORITIES: City of Vancouver and Vancouver Municipal and Regional Employees (1983) 12 L.A.C. (3d) p. 173 at pp 183-4.

DECISION: 88-116

Metropolitan Authority AND Amalgamated Transit Union, Local 508

Cotter, W. Brent - Arbitrator

Kimberly Turner, for the Union
William Cox, Jan Silliker, for the Employer

November 24, 1988

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310; Disciplinary penalties - Culminating incident - Theft 7:3314; Remedies - Authority to award 2:1400 - Substitution of penalty 2:1470; Evidence - Burden of proof 3:2400, - Presentation of evidence - Examination of witnesses - Use of notes 3:3220.

CIRCUMSTANCES: The Grievor, a bus driver, was dismissed for an alleged theft of money intended by a passenger to have been deposited into a farebox on a bus. The Grievor took the money in his hand, then placed it in his pocket. He only replaced the money in the farebox when questioned by a passenger. The Union maintains the Grievor was not attempting to take the money, and regardless of circumstances the dismissal is not an appropriate sanction. The Employer has a well-known rule requiring that drivers do not handle passengers' money. The Employer submits that the Grievor has violated his position of trust as custodian of the Employer's monies and therefore dismissal is a just discipline.

AWARD: The grievance succeeds to the extent that the discipline imposed on the Grievor is reduced from discharge to a six-month suspension without pay. The Board found the Grievor had committed the serious misconduct of attempting to steal the money. However, the Board felt the sanction of dismissal was too severe and replaced it with the lesser penalty, which is still substantial enough to serve as warning that this conduct is unacceptable.

AUTHORITIES: Re A.B.F. Freight Systems (B.C.) Ltd. and General Truck Drivers' and Helpers' Union, Local 31 (1987) 28 L.A.C. (3d) 246 (McPhillips). Re Canex Placer Ltd. and Canadian Association of Industrial, Mechanical, and Allied Workers' International Union, Local 488 (1978) 18 L.A.C. (2d) 130 (Weiler). Re Air Canada and International Association of Machinists and Aerospace Workers (1978) 17 L.A.C. (2d) 337 (Christie). Re Phillips Cables Ltd. (1974) 6 L.C.C. (2d) 35, pp 37-8. Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) p. 387. Re United Steelworkers of America, Local 5297 and Frontenac Floor & Wall Tile Ltd. (1957) 8 L.A.C. 105. Re U.A.W., Local 28 and C.C.M. Co. (1954) 4 L.A.C. 1883; Re Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and Sandwich, Windsor & Amherstburg Railway Co. (1951) 2 L.A.C. 684. Re United Brotherhood of Carpenters, Local 2537 and KVP Co. Ltd. (1962) 12 L.A.C. 386. Re U.A.W., Local 112 and DeHavilland Aircraft of Canada Ltd., being an award of Professor Bora Laskin dated March 13, 1959 (unreported). Re U.A.W., Local 127 and Ontario Steel Products Ltd. (1962) 13 L.A.C. 197; Re Retail, Wholesale & Department Store Union, Local 414 and Dominion Stores Ltd. (1961) 12 L.A.C. 164. Re United Electrical Workers, Local 524 and Canadian General Electric Co. (1957) 8 L.A.C. 132. Re Mine, Mill and Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd. (1956) 7 L.A.C. 130. Re U.A.W., Local 456 and Mueller Ltd. (1958) 8 L.A.C. 144. Re International Brotherhood of Teamsters and Riverside Construction Co. (1961) 12 L.A.C. 145. Re International Brotherhood of Teamsters, Local 979 and Leamington Transport (Western) Ltd. (1961) 12 L.A.C. 147. Re Coast Canadian Inn and British Columbia Government Employees' Union (1986) 26 L.A.C. (3d) 97 (Bluman). Re Prince George Regional Hospital and Hospital Employees' Union, Local 180 (1987) 29 L.A.C. (3d) 38 (Greyell). Re Home Hardware Stores Ltd. and Home Hardware Co. Employees' Association (1988) 32 L.A.C. (3d) 129 (Tadman). Re Nova Scotia Liquor Commission and Nova Scotia Liquor Commission Employees' Union, Local 470 C.L.C. (1974) 5 L.A.C. 117 (Richard). Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1973) L.A.C. (2d) 148 (Palmer) at p. 152. Re Toronto East General Hospital Inc. and Service Employees' International Union (1975) 9 L.A.C. (2d) 311 at p. 323.

DECISION: 88-117

Maritime Telegraph and Telephone Co., Ltd. AND Atlantic Communications and Technical Workers' Union

Darby, Peter E. - Arbitrator

Ronald A. Pink, for the Union
Thomas P. Donovan, for the Employer

November 30, 1988

ISSUES: Discipline and discharge - Just cause 7:1200, - Grounds for - Work performance - Carelessness - 7:3510; Disciplinary penalties - Culminating incident 7:3410, - Progressive discipline 7:4422.

CIRCUMSTANCES: The Grievor was dismissed after a series of motor vehicle accidents compounded by the loss of his driver's licence. The accidents had been deemed preventable and the Grievor had been disciplined in each instance. The loss of his licence meant the Grievor could not carry out his duties. The Union claims the Grievor cannot be discharged for the accidents because he had already been disciplined. In addition, dismissal for loss of driving privileges is contrary to the collective agreement and is also discriminatory as no employee has ever been disciplined in that situation. The Employer rejects all Union arguments.

AWARD: The grievance fails. The Grievor was discharged for his inability to operate company vehicles in a safe and responsible manner, not for his three accidents. The Grievor had apparently not benefited from repeated driver's training, nor had repeated discipline affected his behaviour. Finally, there is no evidence of any violation of the collective agreement.

AUTHORITIES: Motor Vechicle Act, R.S.N.S. 1967, C. 191, s. 96(2). Re Penticton and District Retirement, Service and Hospital Employees' Union, Local 180 (1978) 18 L.A.C. (2d) 107 (McIntyre) at p. 110. Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) pp. 486-7. Re Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979) 23 L.A.C. (2d) 32 (Shime) at p. 38.

DECISION: 88-118

Doug Burns Excavation Contractors Ltd. AND United Mine Workers of America, District 26

MacDonald, David J. - Arbitrator

Tim Chiasson, for the Union
Eric Durnford, for the Employer

November 27, 1988

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, - Obey now grieve later - Exceptions 7:3620; Collective agreement - Form and content - Ancillary documents 4:1200; Company rules 4:1500.

CIRCUMSTANCES: The Grievor was suspended for three days without pay after he refused to operate a piece of heavy equipment at his supervisor's request. The Grievor said he was not qualified to operate the equipment, and he was not listed as qualified on the equipment operators schedule. The Grievor would not comply unless the supervisor signed a slip absolving him of responsibility in the event something went wrong. The Grievor asserts the suspension was unjust and wants compensation for the three days plus any record of the incident be removed from his file. The Employer maintains the Grievor is qualified to operate the equipment and his absence from the equipment operators' schedule was an oversight.

AWARD: The grievance succeeds to the extent the letter of suspension be removed from the Grievor's file. The Grievor was following his Union's directive when he demanded his supervisor sign a slip absolving him from responsibility if anything went wrong when operating the equipment. The Board found the Grievor to be insubordinate, but with no negative intentions.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) at p. 434. Ford Motor Co. (1944) 3 L.A.C. 799 at p. 799.

DECISION: 88-119

Good People Sea and Shore Services Inc. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 230B

Scaravelli, N.M. - Arbitrator

Victor Tomiczek, for the Union
Eric Durnford, for the Employer

November 30, 1988

ISSUES: Strikes and lockouts - Unlawful strikes - Discipline 9:2410; Evidence - Burden of proof - Unlawful strike 3:2416; Grievance procedure - Compliance with 2:3120; Termination - Wrongful dismissal 7:1000; Discrimination - Discipline - Onus 7:4414.

CIRCUMSTANCES: The two Grievors were dismissed as a result of an illegal work stoppage and walkout at the Employer's place of business. The Employer alleges the walkout was instigated, encouraged and led by the two Grievors. The Union claims the evidence is not clear regarding the Grievors' acting in a leadership capacity, and that singling out the two Grievors is discriminatory. Both Grievors are claiming unjust dismissal and seek reinstatement with full seniority plus lost wages and benefits.

AWARD: Both grievances fail. The Employer has proved the Grievors had acted in leadership roles in the illegal walkout. In addition, the Board felt the discipline imposed was appropriate and not discriminatory.

AUTHORITIES: Re Iron Ore Co. of Canada and United Steel Workers, Local 5795 11 L.C.C. (2d) 16. Re Hawker Industries Ltd. Trenton and U.S.W., Local 1231 (1974) 7 L.A.C. (2d) 254 p. 260.

DECISION: 88-120

Camp Hill Hospital AND Nova Scotia Nurses' Union, Camp Hill Hospital Local

Demont, Eric G. - Chair; McDougall, Donald H.; Pink, Ronald

Elizabeth M. Mullaly, for the Union
Eric Durnford, for the Employer

undated,(dissent, November 26, 1988)

ISSUES: Wages - Increases - Progressive wage increases 8:2320; Interpretation - Intention of the parties 4:2100; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430; Estoppel 2:2200.

CIRCUMSTANCES: The Employer refused to grant the Grievor a salary increment because she is a part-time employee and her increments are based on the actual time worked, not on a specific calendar period. The Union maintains the collective agreement states each permanent employee is to receive an increment one calendar year after employment commences, with no distinction between full- and part-time staff. The Employer's position is there is an ambiguity in the collective agreement, and that "year" means service or work for the number of hours equivalent to one year of regular employment. The issue is whether or not the Grievor is entitled to her increment one year after she commenced employment, or whether she must wait until she has worked enough hours to equal one year.

AWARD: The grievance succeeds, but the Union is estopped from enforcing its rights in this regard during the term of the current collective agreement. The Board found the agreement was not ambiguous in determining when increments are to be granted. An anniversary date is established for each employee for the sole purpose of calculating increments, and these are based on a calendar year, not on hours worked.

DISSENT: McDougall would have dismissed the grievance. He feels the majority has failed to recognize the ambiguity in the collective agreement regarding the interpretation of "yearly". Furthermore, the majority has granted the Union a right which they did not have before, nor had they sought to enforce it before this grievance.

AUTHORITIES: Re Toronto Harbour Commissioners, 3 L.A.C. (2d) 145. Re Ottawa Citizen, 14 L.A.C. (2d) 172. Twin Oaks Memorial Hospital (majority decision of Christy and McDougall). Dartmouth General Hospital, 3 L.A.C. (3d) 420; Brown and Beatty, para. 1:3000, 4:2100. Grace Maternity Hospital Arbitration. Palmer, Collective Agreement Arbitrations in Canada (2nd ed.) p. 150, 153. U.A.W., Local 1976 v. McDonnel Douglas Canada Limited (1984) 3 O.A.C. 363. Nova Scotia Nurses' Union v. Grace Maternity Hospital. Nova Scotia Government Employees' Union v. Civil Service Commission.

DECISION: 88-121

Nova Scotia Power Corp. AND International Brotherhood of Electrical Workers, Local 1928

Archibald, Bruce - Arbitrator

Raymond F. Larkin, for the Union
Gregory I. North, for the Employer

December 7, 1988

ISSUES: Job posting - Bona fides 5:2300, - Posting procedure 5:2520, - Evidence - Burden of proof 3:2413; Seniority - Applications - Promotion, demotion and transfer 6:2100; Work assignment - Location 5:2500.

CIRCUMSTANCES: The Grievor was not chosen for a position he had applied for and charges that the Employer's selection process contravened the collective agreement. A candidate with less seniority than the Grievor was chosen, and the Grievor charges this and other selection practices are unfair. The Employer argues the evidence does not demonstrate any bias against the Grievor.

AWARD: The grievance fails. The burden of proof was on the Grievor to demonstrate that the Employer applied inappropriate criteria in its hiring procedure, that the procedure was unfair or biased, or that the outcome was unreasonable. The Board felt the Grievor failed to demonstrate this proof.

AUTHORITIES: Sutherland-Harris v. The Nova Scotia Nurses' Union (unreported, May 1985) (R. Lorne MacDougall, Chair). Re Northern Telecom Ltd. and U.A.W. Local 1839 (1980) 25 L.A.C. (2d) 379 at p. 384. Brown and Beatty, Canadian Labour Arbitration (2nd ed.) Canada Law Book, Aurora, 1984, p. 308. Re Textile Workers Union and Lady Galt Towels Ltd. (1969) 20 L.A.C. 382 at pp. 384-5. Brown and Beatty, pp. 309-10. Palmer, E.E., Collective Agreement Arbitration in Canada (2nd ed.) Butterworths, Toronto, 1983 at p. 525. Re General Freezer (1974) 6 L.A.C. (2d) 296 at 299 (Shime). Union Carbide Limited Case (1967) 18 L.A.C. 109 at p. 118.

DECISION: 88-122

Halifax Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada, Local No. 1

Kydd, William H. - Arbitrator

Les Holloway, David M. Clark, for the Union
Gerald Hoganson, for the Employer

November 14, 1988

ISSUES: Interpretation 4:2300, - Intention of the parties 4:2100, - Aids to interpretation - Dictionaries 4:2210; Job classification and description - Transfer of work between 5:2000.

CIRCUMSTANCES: The Grievor was not hired by the Employer to do rigging work because another employee was assigned to do this work. The docking of a ship traditionally requires four riggers, and in this case only three riggers were assigned because the Employer assigned a chargehand to do the remaining work. The Grievor charges this contravenes the collective agreement and wants payment of all monies lost to him due to this alleged contravention.

AWARD: The grievance succeeds. According to the collective agreement, chargehands are allowed to assist for short periods of time when required, but not to replace riggers working on a standby situation. The Grievor should be compensated for his lost working time in accord with the collective agreement.

AUTHORITIES: The Company and Local 13 of the Union, unreported, dated December 2, 1987.

DECISION: 88-123

Arrow Building Corp. Ltd. and LaFleche Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Scaravelli, N. M. - Arbitrator

Gordon N. Forsythe, for the Union
Peter McLellan, for the Employer

December 6, 1988

ISSUES: Grievance - Settlement of grievance 2:3230, Who may 3:1200; Remedies - Authority to award 2:1400.

CIRCUMSTANCES: The Grievor wishes enforcement of a previous settlement agreement, specifically the payment of unpaid balances owing pursuant to the terms of the agreement. In addition, the Arbitrator is to determine whether one or both companies named as Employers are liable for the payment.

AWARD: The settlement agreement clearly indicates that LaFleche Construction Limited pay, to the Grievor, specific sums as outlined by the Arbitrator in the schedule.

DECISION: 88-124

Riley Electric Ltd. AND International Brotherhood of Electrical Workers, Local 625

Eric DeMont - Arbitrator

n/a, for the Union
Stanley MacDonald, for the Employer

December 6, 1988

ISSUES: Wages 8:1000; Remedies - Enforcement of award by board of arbitration 2:4000.

CIRCUMSTANCES: This arbitration order concerns the failure of the Employer to remit benefits on behalf of the employees. The Employer agrees it owes the Union for benefits due plus legal and arbitrator's fees.

AWARD: The Employer is ordered to pay the Union according to the schedule established by the Arbitrator.

DECISION: 88-125

Maritime Telegraph and Telephone Co. Ltd. AND Telephone Employees' Union

Darby, Peter E. - Arbitrator

Ronald A. Pink, for the Union
Terry L. Roane, for the Employer

December 7, 1988

ISSUES: Job posting 5:2520, 6:2310, - Evidence - Burden of proof 3:2413; Skill and ability - Examinations and tests 6:3340.

CIRCUMSTANCES: Two individuals are grieving the selection of a third individual for a position for which they and others had applied. The Union argues that the selection process at the interview stage was flawed, unfair and unreasonable and that portions of the selection process should be repeated with a new interviewing team and in accordance with the collective agreement. The Employer denies any breach of procedure and maintains its selection process is fair and reasonable.

AWARD: The grievance succeeds. The Board found evidence the Employer had been inconsistent and haphazard in the selection process, specifically in the evaluation of the candidates' test results and importance of prior related experience. Furthermore, the Employer has failed to establish the burden of proof it applied the relevant selection criteria fairly to all candidates. The Grievors are directed to reapply for the position in question. The interviews are to be conducted by not more than three persons who have not had any association with the prior selection process. In addition, the interviewers are directed to establish and apply a proper set of selection criteria.

AUTHORITIES: N.S. Government Employees' Union (Balcolm) and Civil Service Commission (February 19, 1981) (unreported, Clarke);(June 26, 1986) (Outhouse). Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984, Can. Law Book Co.) p. 309. Palmer, E.E., Collective Agreement Arbitration in Canada (2nd ed. 1984, Butterworths) at p. 509. Webster's New Collegiate Dictionary, p. 2. Atlantic Communications and Technical Workers' Union and Maritime Telegraph and Telephone Company, Limited (April, 1985), (unreported, Darby) at pp 3-11. Brown and Beatty 6:3100 at p. 298. Re United Brewery Workers, Local 173 and Carling Breweries Ltd. (1968) 19 L.A.C. 110 (Christie). Re Canadian Trailmobile Ltd. and U.A.W., Local 397 (1973) 2 L.A.C. (2d) k3 (Brown). Re U.A.W., Local 707 and Ford

Motor Co. of Canada Ltd. (1970) 21 L.A.C. 61 (Weatherill). Re Oil, Chemical and Atomic Workers, Local 9-14 and Polymer Corp. Ltd. (1972) 24 L.A.C. 277 (O'Shea). Canadian Food and Allied Workers, L. 175 v. Great Atlantic and Pacific Co. of Canada Ltd. et al., 76 C.L.L.C. 14,056 at pp 334-5 (Ont. Div. Ct.) leave to appeal to C.A. refused 13 L.A.C. (2d) 211n. Re Northern Telecom Ltd. and United Automobile Workers, Local 1839 (1980) 25 L.A.C. (2d) 379 (Fraser). Brown and Beatty, p. 302. N.S. Government Employees' Union (Vermeulen) and Civil Service Commission (May 8, 1984) (unreported, Darby) at p. 19.

DECISION: 88-126

Truro (Board of Police Commissioners for the Town) AND Police Assn. of Nova Scotia, Local 102

MacLellan, J.A. - Chair; Durnford, Eric; MacDougall, Charles

David Fisher, for the Union
D.W. Gruchy, for the Employer

December 9, 1988

ISSUES: Wages - Arbitration of rates 8:1000; Evidence - Burden of proof - Work assignment outside classification 3:2414, 5:2430; Time-Limits - Restriction on arbitrability 2:1100.

CIRCUMSTANCES: The Grievor, a Police Constable, was assigned to temporary duty as senior officer in charge of a special operation. The Grievor claims he was actually doing Detective work, which is a position higher than his rank and that he should therefore receive an additional two hours pay for each of the ten shifts he worked. The Employer argues that the job the Grievor was doing was nothing more than the job that is carried out by a Constable in a platoon. Furthermore, the job the Grievor did was merely a shared function that is done by both Detectives and Constables who are members of a platoon.

AWARD: The grievance fails. The Grievor has not satisfied the burden of proof to establish that the work he performed was beyond that work normally required by a Constable in a platoon and outside the shared job functions of Detectives and Constables.

DISSENT: MacDougall felt the Grievor was acting as the person in command and, according to the collective agreement, should have received the Sergeant's rate of pay.

DECISION: 88-127

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada

Kydd, William H. - Arbitrator

Les Holloway, David Clark, for the Union
Gerald Hoganson, for the Employer

November 10, 1988

ISSUES: Disciplinary penalties - Mitigating factors - Refusal to obey instructions - Lateness 7:3140, - Types of penalties - Warning 7:4210; Discipline and discharge - Raising new grounds 3:2200, 7:2200.

CIRCUMSTANCES: The Grievors allege they were improperly given a warning for lateness on two subsequent days. The Union takes the position that an employee is entitled to stay in the lunch room until the noon whistle blows and travel back to the workplace on the Employer's time. In this incident, the Grievors attended a meeting at the Employer's request regarding a Union meeting and, as a result, were late taking their lunch break and late returning to work. They received warning slips with all the other employees who returned to work when the noon whistle blew. Their supervisor was unaware they had been at a meeting and were entitled to return later than the others, but the Company refused to withdraw the warning slips. The next day the Grievors received another warning slip for returning to work at 12:02 noon. The Employer maintains employees should be back at the work place when the noon whistle blows. In addition, they feel the deliberate tardiness and the alleged lunch hour meeting were all part of the same act.

AWARD: The grievance succeeds and the warning slips must be removed from the Grievors' files. The issue is whether the Employer was justified in refusing to withdraw the warning slips after it became apparent the Grievors were not late. The Board felt the Employer cannot raise the second ground (the alleged Union meeting) in substitution for the first when it became invalid.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.), p. 342. Re U.S.W. and Aerocide Dispensers Ltd. (1965) 15 L.A.C. 416 at pp. 426-7. Brown and Beatty, p. 340.

DECISION: 88-128

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees' Union

Archibald, Bruce P. - Chair; Durnford, Eric; Tynes, Michael

Ronald A. Pink, Kimberley W. Turner, for the Union
Ross Mitchell, Bruce McCharles, and Don Nelson, for the Employer

November 8, 1988

ISSUES: Job classifications and descriptions - Creation or revision 5:2000, 5:2200, Change of work load/job function 5:2410; Wages - Rates for new and revised classifications 5:2440, 8:1000.

CIRCUMSTANCES: The four Grievors allege the Employer failed to create a classification which properly reflects their job duties and accordingly, fails to pay them the appropriate higher rate. The dispute between the parties is over what the proper classification of the Grievors ought to be and how much they ought to be paid in consequence. The Employer acknowledges the unique aspects of the Grievors' positions but argues their classification is the most appropriate compromise. Furthermore, the Employer feels the Board has no jurisdiction to amend the collective agreement by creating new job categories for the Grievors.

AWARD: The grievance succeeds. The Board agrees with the Employer that they cannot establish an appropriate classification and pay grade for the Grievors, nor can one be imported from another collective agreement. However, the Board orders that the four Grievors be classified as holding Clerk IV positions under the new agreement and that they be assigned an appropriate pay grade effective as of the date of the grievance.

AUTHORITIES: Civil Service Collective Bargaining Act, S.N.S. 1978, C. 3 ss. 28, 29. N.S.G.E.U. v. Civil Service Commission , January 15, 1986, Arbitrator S. Bruce Outhouse, (unreported). Nova Scotia Civil Service Commission v. Nova Scotia Government Employees' Union , N.S.S.C. (T.D.) per Burchell, J., April 30, 1986 (unreported). N.S.G.E.U. v. Civil Service Commission, May 6, 1986, Arbitrator S. Bruce Outhouse (unreported). N.S.G.E.U. v. Civil Service Commission re A Union Policy Grievance, July 21, 1986, Arbitrators S. Bruce Outhouse, Gregory North, and David Reynolds, (unreported). N.S.G.E.U. v. Civil Service Commission, December 10, 1986 per Arbitrator S. Bruce Outhouse (unreported). N.S.G.E.U. v. Civil Service Commission, February 24, 1987, Arbitrator S. Bruce Outhouse (unreported). Re Windsor Public Utilities Commissionn and I.B.E.W. Local 911, (1974), 7 L.A.C. (2d) 380 (Adams). Re Municipality of Metropolitan Toronto and C.U.P.E., Local 143, (1975), 10 L.A.C. (2d) 247 (Adams).

DECISION: 88-129

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781

Outhouse, Bruce - Arbitrator

Bernard Boudreau, for the Union
Charles Broderick, for the Employer

December 2, 1988

ISSUES: Seniority - Applications -Promotion, demotion and transfer 6:2000, 6:2100; Job posting 5:2520, 6:2310; Skill and ability - Criteria of ability and qualifications - Bona fides of 6:3300, - Burden of proof 3:2413.

CIRCUMSTANCES: The Grievor was not appointed to a position within the bargaining unit for which he was the senior applicant. The Union alleges the Employer has violated the collective agreement by not appointing the Grievor, and that their hiring procedure was flawed. The Union asks that he be awarded the position together with the appropriate compensation retroactive to the date of the current appointee's commencement of the job. The Employer asserts the Grievor did not possess the required qualifications and ability for the job in question and denies any breach of the collective agreement.

AWARD: The grievance succeeds. The Employer's assessment of the Grievor's qualifications and ability relative to the job in question was unreasonable, and given his seniority, the Grievor ought to have been awarded the position. The appointment of the incumbent is set aside and the Employer is directed to award the position to the Grievor, with compensation to make up for the difference between the Grievor's current salary and the salary in the new position for the time period in question.

AUTHORITIES: Re Canadian Trailmobile Ltd. and United Automobile Workers, Local 397 (1975) 10 L.A.C. (2d) 92 (Adams). Re Alliance Canners Ltd. and Soft Drink Workers Joint Local Executive Board of Ontario (1978) 17 L.A.C. (2d) 370 (Linden). Cape Breton District School Board and Canadian Union of Public Employees, Local 781 (June 6, 1986) (unreported, Ferguson). Re Steinberg Inc. and Commercial Workers' Union, Local 486 (1984) 16 L.A.C. (3d) 171 (Fraser). Re City of Lethbridge and Canadian Union of Public Employees, Local 70 (1986) 26 L.A.C. (3d) 81 (England). Re School District 36 (Surrey) and Canadian Union of Public Employees, Local 728 (1987) 29 L.A.C. (3d) 376 (Larson). Re McKechnie Ambulance Service Inc. and Ontario Public Service Employees' Union, Local 347 (1987) 27 L.A.C. (3d) (Verity). Canadian Union of Public Employees, Local 781 and Cape Breton District School Board (September 11, 1987) (unreported, Ferguson). Re Reynolds Aluminum Company Canada Ltd. and International Molders and Allied Workers' Union, Local

28 (1974) 5 L.A.C. (2d) 251 (Schiff) at pp. 254-5. Re United Brewery Workers', Local 173 and Carling Breweries Ltd. (1968) 19 L.A.C. 110 (Christie). Re Textile Workers' Union and Lady Galt Towels Ltd. (1969) 20 L.A.C. 382 (Christie). Re Canadian Trailmobile Ltd. and U.A.W., Local 397 (1973) 2 L.A.C. (2d) 13 (Brown). Re U.A.W., Local 3997 (1973) 2 L.A.C. (2d) 13 (Brown). Re U.A.W., Local 707, and Ford Motor Co. of Canada Ltd. (1970) 21 L.A.C. 61 (Weatherill). Re Oil, Chemical and Atomic Workers, Local 9-14 and Polymer Corp. Ltd. (1972) 24 L.A.C. 277 (O'Shea). Re International Union of Electrical, Radio and Machine Workers, Local 542 and RCA Victor Company Ltd. (1971) 22 L.A.C. 329 (Simmons). Re Kelsey Hayes Canada Limited and United Automobile Workers, Local 240 (1972) 1 L.A.C. (2d) 54 (Weiler).

DECISION: 88-130

Grace Maternity Hospital AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606

Darby, Peter E. - Arbitrator

Gordon N. Forsyth, for the Union
Jan Silliker, for the Employer

December 14, 1988

ISSUES: Seniority - Applications - Promotion, demotion and transfer 6:2000, 6:2100; Skill and ability - Burden of proof 3:2413, - Criteria of ability and qualifications - Bona fides of 6:3300; Job posting 6:2310, - Posting procedure 5:2520.

CIRCUMSTANCES: The Grievor alleges the Employer violated the collective agreement by appointing a more junior employee to a position for which the Grievor had applied.

AWARD: The grievance succeeds. The Board found deficiencies in the Employer's methods for evaluating and rating skill and ability of the applicants, the only factors allowing a junior employee to take precedence over a senior one. The Employer is directed to repeat the competition procedure for the two competing applicants, developing and applying a reasonable set of criteria reflecting the position in question. Should the competition favour the Grievor who has since won a later competition for a similar position, he should be compensated for the difference in salaries for the time period involved in the dispute.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984, Canadian Law Book Co.) at pp. 102-3, p. 309, pp. 301. Re United Brewery Workers, Local 173 and Carling Breweries Ltd. (1968) 19 L.A.C. 110 (Christie). Re Textile

Workers Union and Lady Galt Towels Ltd. (1969) 20 L.A.C. 382 (Christie). Re Canadian Trailmobile Ltd. and U.A.W., Local 397 (1973) 2 L.A.C. (2d) 13 (Brown). U.A.W., Local 707 and Ford Motor Co. of Canada Ltd. (1970) 21 L.A.C. 61 (Weatherill). Re Oil, Chemical and Atomic Workers, Local 9-14 and Polymer Corp. Ltd. (1972) 24 L.A.C. 277 (O'Shea). Brown and Beatty, p. 5, p. 297. Webster's New Collegiate Dictionary (1949, G. & C. Merriam Co.) at p. 27. N.S.Government Employees' Union and Civil Service Commission (May 8, 1984) (unreported, Darby).

DECISION: 88-131

Grace Maternity Hospital AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 606

Archibald, Bruce P. - Arbitrator

Gordon Forsyth, for the Union
Terry Roane, Don Ingersoll, for the Employer

December 14, 1988

ISSUES: Management rights 4:2300; Interpretation - Intention of the parties 4:2100; Job posting - Posting procedure 5:2520; Working hours and shifts 5:3100.

CIRCUMSTANCES: The Union alleges the Employer violated the collective agreement by shifting a part-time employee to the equivalent of a full-time position without reclassifying and posting the position. The Union argues the Employer has called the full-time position two part-time positions in order to shield the incumbent from a competition. The Union wants the position classified as full-time and a vacancy posted in accordance with the collective agreement. The Employer claims it is a management prerogative to determine whether a vacancy exists and if it is full- or part-time. The Employer denies any discrimination in favour of the incumbent and maintains the granting of the additional hours was merely a practical solution to the situation.

AWARD: The grievance fails insofar as the necessity of immediately posting a full-time position. However, the Board has determined that the Employer has created a full-time position by virtue of scheduling two back-to-back part-time shifts, and if vacant in the future, this position must be posted as a full-time one. The Board found no evidence of discrimination by the Employer in favour of the incumbent.

AUTHORITIES: Re International Union of Operating Engineers, Local 968B and Governors of Acadia University (1985) 16 D.L.R. (4th) 722.

DECISION: 88-132

Nova Scotia (Solicitor General) AND Police Assn. of Nova Scotia

Christie, Innis - Chair; Durnford, Eric; MacDougall, Charles

David W. Fisher, for the Union
Marian Tyson, for the Employer

December 13, 1988

ISSUES: Discipline and discharge - Just cause 7:1200, - Order of procedure 7:2400; Disciplinary penalties - Reasonableness 7:4300, - Types of penalties - Monetary penalties - Work performance 7:3542; Estoppel 2:2220.

CIRCUMSTANCES: The Grievor was the senior officer of duty in a correctional institute when a small fire broke out in one of the prisoners' areas. In the confusion of extinguishing the fire, doors were left open and four prisoners escaped, injuring the Grievor in the process. The Employer suspended the Grievor for one shift without pay as discipline for disregard of procedures due to carelessness or error of judgement resulting in the escape of prisoners. The Union alleges the discipline is without just cause and requests the suspension be removed without loss of pay. In addition, the Union claims the Employer delayed too long in imposing the suspension and this requires the suspension be nullified.

AWARD: The grievance fails. The Board found the disciplinary suspension imposed on the Grievor was justified because evidence indicated he had acted either carelessly or with bad judgement in leaving area doors open. In addition, the delay between the incident and the imposition of discipline does not justify nullifying the suspension.

DISSENT: MacDougall felt the Grievor should not be held solely responsible for the incident as he was only the senior officer and not the shift supervisor. More importantly, the delay in the imposition of discipline was significant and justifies nullifying the suspension.

AUTHORITIES: Corporation of the Borough of North York (1979) 20 L.A.C. (2d) 289. Re Reimer Express Lines Ltd. and Teamsters' Union, Local 880 (1958) 8 L.A.C. 341 (Schwenger). Brunswick Bottling Ltd. (1984) 16 L.A.C. (3d) 249. Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) para 2:2220.

DECISION: 88-133

Lummus Canada Inc. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Outhouse, Bruce - Arbitrator

Elwin MacNeil, for the Union
Karin McCaskill, for the Employer

December 16, 1988

ISSUES: Work assignment - Contracting out 5:1300, Employees outside unit 5:1400; Collective agreement - Form and content - Ancillary documents 4:1200; Interpretation - Words and phrases - Bargaining unit work 5:1200; Strikes and Lockouts - Unlawful strikes - Union liability 9:2434.

CIRCUMSTANCES: The Union alleges the Employer breached the collective agreement by assigning certain work to labourers rather than to carpenters. The Union seeks a declaration that the work belongs to carpenters, plus compensation for all hours of work lost as a result of the work assignment to labourers. The Employer maintains the work assignment was based on area practice because the labourers and the carpenters could not agree on the division of the work and were threatening a work stoppage.

AWARD: The grievance succeeds. The Employer ought to have resisted the improper pressures which both Unions brought to bear on it, and followed its original plan of assigning the work based on the agreement rather than resorting to area practice. No damages will be awarded the Union because the Union contributed to the problem by its illegal work stoppage.

AUTHORITIES: Re United Brotherhood of Carpenters and Joiners of America, Local 83 and Kingston Construction Limited (March 7, 1984) (unreported).

DECISION: 88-134

Glades Lodge Ltd. AND Canadian Union of Public Employees, Local 1259

Veniot, Milton J. - Chair; Tynes, Mike; Veinotte, Phil

Mike McNeil, for the Union
D.B. Eddy, for the Employer

December 1, 1988

ISSUES: Management rights 4:2300, - Job standard 4:2310; Working hours and shifts - 5:3100; Collective agreement - Form and content - Company rules 4:1500.

CIRCUMSTANCES: The Union alleges in this policy grievance that the Employer has made changes to the collective agreement with regard to rights, benefits, privileges, and specifically, working conditions by institution of a new practice requiring employees to punch a time clock at the outset of their paid breaks. The Employer relies on its management rights to institute the practice.

AWARD: The grievance succeeds. The Employer's imposition of time punching for coffee breaks is a change of working conditions which contravenes the collective agreement. The requirement of break time punching must immediately cease. The two parties have already amicably settled the timing of the breaks.

DISSENT: Veinotte would have dismissed the grievance because he felt the Union had provided neither evidence nor arguments to prove its case.

AUTHORITIES: Re Provincial Council of Construction Union and Piggott Construction Co. Ltd. (1965) 16 L.A.C. 32 (Hannahan). Re Milk and Bread Drivers', Local 647 and Dominion Dairies Ltd. (1969) 20 L.A.C. 315 (Weatherill). Re Corporation of the City of Vanier and CUPE, Local 954 (August 20, 1975) (unreported, Crete). Re Ontario Educational Communications Authority and National Association of Broadcast Employees and Technicians (1976) 11 L.A.C. (2d) 30 (Linden). Re Ontario Educational Communications Authority and National Association of Broadcast Employees and Technicians (1978) 11 L.A.C. (2d) 258 (Brent). Re Corporation of the City of Ottawa and CUPE, Local 503 (unreported, April 1977, Weatherill). Re Religious Hospitals of St. Joseph of Villa Maria and Service Employees' International Union, Local 210 (1982) 7 L.A.C. (3d) 131 (Saltman). The Miriam Home v. Canadian Union of Public Employees, Local 2115 et al (1985) C.C.H. Labour Decisions 12, 066 (S.C.C.). Re MacKinlay Transport Ltd. and Teamsters' Union, Local 938 (1986) 24 L.A.C. (3d) 397 (O'Shea). Re Regional Municipality of Ottawa - Carleton and Ottawa - Carleton Regional Health Unit and Ottawa Public Employees' Union (unreported, January 22, 1987) (Picher). Re Town of Dryden and Dryden Police Association [1973] 1 O.R. 619 (H. Ct.) at p. 621. Nova Scotia

Government Employees' Union v. Scarabelli and Liquor Commission (N.S.) (1985) 69 N.S.R. (2d) 353. (1959) 9 L.A.C. 353 (Schwenger). Cyanamid Ltd. (1959) 9 L.A.C. 353 (Schwenger).

DECISION: 88-135

Larsen Packers Plant, Division of ACA AND United Food and Commercial Workers' International Union, Local 1252

Veniot, Milton J. - Arbitrator

Thomas Pittman, for the Union
John Plowman, for the Employer

December 2, 1988

ISSUES: Interpretation - Intention of the parties 4:2100, - Words and phrases - Measurement of time - Normal or regular hours 5:3100; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430; Overtime - Defining overtime - Daily overtime 8:2100, - Premiums - Pyramiding 8:2140; Vacation - Computation of vacation and vacation pay 8:3230.

CIRCUMSTANCES: The Employer had followed a practice of "moving" a named holiday when it fell on a Saturday or Sunday. The holiday was moved to a regular working day and the plant was closed on that day. In this incident, the Employer moved the Boxing Day holiday to a Wednesday and closed the plant. The plant required a four-hour shift on December 26. The Union claims the employees who worked were entitled to a double time premium for hours worked on a holiday, plus the time-and-one-half premium for work performed on a non-scheduled day. The Employer claims the employees should be paid at a time-and-one-half premium because the holiday had already been moved and December 26 was defined as a non-scheduled work day.

AWARD: The grievance fails. There is an ambiguity in the language of the collective agreement, plus a clause had inadvertently been omitted, adding to this ambiguity. However the Board found the Employer's interpretation and application to be the correct ones.

AUTHORITIES: Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Incorporated) (1969) 3 D.L.R. (3d) 161 at p. 216. Brown and Beatty, p. 153, p. 158. Re Ellenzweig Bakery and Retail Wholesale and Department Store Union, Local 461 (1984) 12 L.A.C. (3d) 336 (D. MacLaren) at p. 340. Turner, The Law Relating to Estoppel by

Representation, 3rd ed. (Toronto, Butterworths, 1977). Re City of Penticton and Canadian Union of Public Employees, Local 608 (Weiler) (1979) 18 L.A.C. (2d) 307.

DECISION: 88-136

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J.- Chair; North, Gregory I.; Clarke, Rick

Elwin Harris, for the Union
Jonathan Davies, for the Employer

December 6, 1988

ISSUES: Discipline and discharge - Grounds for - Alcoholic beverages 7:3560; Disciplinary penalties - Mitigating factors - Rehabilitative potential 7:4422, - Arbitral review - Substitution of penalty 7:4000.

CIRCUMSTANCES: There were two grievances. The first grievance was against the dismissal of the Grievor from his employment as a snowplow operator. The Grievor, while on duty, was given "alert" and breathalyzer tests from the RCMP and was found to have blood alcohol levels marginally over the legal limit. He was charged with and pleaded guilty to illegal possession of alcohol. He was dismissed from his job by the Regional Manager. The first grievance was filed and allowed by the Superintendent of Highways, who substituted a conditional reinstatement whereby after a three-month suspension the Grievor had to demonstrate he was not dependent on alcohol. The Deputy Minister rescinded this settlement and the Employer took the position that the Superintendent did not have the authority to reinstate after the dismissal by the Regional Manager. The Grievor filed a second grievance, grieving whether the dismissal was justified or whether the first grievance was settled so it could be relied on.

AWARD: The grievance succeeds. The Board has substituted a period of suspension without pay and benefits from the date of the infraction to the date of the Grievor's acceptance of conditions of his reinstatement: treatment of his alcohol problem.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2d) 1984, pp. 490-2, p. 493.

DECISION: 88-137

Halifax (City) AND Canadian Union of Public Employees, Local 143

Cotter, W. Brent - Arbitrator

Kimberley H.W. Turner, for the Union
Gerald Goneau, for the Employer

October 25, 1988

ISSUES: Work assignment - Contracting out - Employees outside unit 5:1400, - Improper assignment within unit 5:2000; Overtime - Distribution of overtime - Persons normally performing 5:3222, - Scheduling 5:3100.

CIRCUMSTANCES: The Grievors are employed as cemetarians and had been required in the past to carry out some of their duties on weekends as overtime work. They allege that in June 1987 the Employer began assigning this work to management personnel, in violation of the collective agreement. The Union asks that this practice be stopped and the Grievors be reimbursed for the overtime hours lost. The Employer argues the work previously assigned to the Grievors was voluntary overtime and its elimination did not cause a reduction in hours of work or pay. The Employer further claimed management was within its rights to manage its workplace and reassign work as required.

AWARD: The grievance succeeds. The Arbitrator acknowledges the Employer's intent in changing the work assignments was motivated by an effort to achieve some efficiencies and cost savings. However, certain elements of the Grievors' jobs are theirs alone and cannot be carried out by management or anyone else. The Employer is ordered to reimburse the Grievors for the amounts of overtime work for which they have been deprived by the contravention of the collective agreement. The Employer is also directed to assign all future bargaining unit work to comply with the collective agreement.

AUTHORITIES: Re Corporation of Borough of Scarborough and Canadian Union of Public Employees, Local 368 (1975) 10 L.A.C. (2d) 188 (Adams). Re Orenda Ltd. and International Association of Machinists, Lodge 1922 (1972) 1 L.A.C. (2d) 72 (Lysyk). Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) at pp. 218-20. Palmer, E.E., Collective Agreement Arbitration in Canada (2nd ed., 1983) at pp. 438-41.

DECISION: 88-138

Cape Breton Regional Transit Authority AND Canadian Brotherhood of Railway, Transport and General Workers, Local 230

McDade, Bruce R. - Arbitrator

Victor Tomiczek, for the Union
Bernard Boudreau, for the Employer

November 2, 1988

ISSUES: Working hours and shifts - 5:3100; Interpretation - Words and phrases - Measurement of Time - Work week 4:2100; Time-Limits - Restriction on arbitrability 2:1100.

CIRCUMSTANCES: The Grievors are bus drivers who are claiming compensation for hours of work allegedly lost during the two week period of the Canada Winter Games. The Games resulted in a two week school closure, double the length of the normal spring break, and during this time the school bus portion of the Grievors' usual work assignment was not be available. The Union argues the collective agreement guarantees an average of forty hours of work per week per operator, and a fourth "schedule pick" or other work assignment should have been granted the Grievors. The Employer alleges the collective agreement does not provide for a guarantee of hours to be worked or paid.

AWARD: The grievance fails. There is no guarantee in the collective agreement regarding a forty-hour week for the operators. Furthermore, there was no compelling evidence from either the agreement or past practice to dictate another "schedule pick" or work assignment.

AUTHORITIES: Re Algoma Ore Division, Algoma Steel Corp. and United Steelworkers, Local 3933, 27 L.A.C. (3d). Re Domglas Ltd. and United Glass and Ceramic Workers, 26 L.A.C. (2d).

DECISION: 88-139

Halifax (City) AND Halifax Civic Workers' Local 108, Unit #1

Outhouse, Bruce - Chair; Ross, Joe; North, Gregory

Charles MacDougall, Joseph Rose, for the Union
Barry Allen, for the Employer

November 30, 1988

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions - Health and safety 7:3621; Evidence - Burden of proof - Applications - Discipline 3:2411.

CIRCUMSTANCES: The Union alleges that the Employer violated the collective agreement and the Occupational Health and Safety Act by suspending the Grievor for one day for refusing to perform work the Grievor believed to be unsafe. The Union requests the suspension be removed from the Grievor's record, and that he be compensated for lost pay and benefits. The Employer asserts that the Grievor's actions were insubordinate, and were not based on safety considerations.

AWARD: The grievance fails. The Board found no reasonable grounds for believing that the situation posed a threat to safety. It did find, however, that the Grievor's supervisor was not informed about the Employer's policy regarding refusal of unsafe work, and recommended immediate rectification.

AUTHORITIES: Occupational Health and Safety Act, S.N.S., 1985 c. 3, 8.22 (1). Brown and Beatty, Canadian Labour Arbitration, (2nd ed.) p. 442. Re Industrial Union of Marine and Shipbuilding Workers of Canada, Local No. 1, and Halifax-Dartmouth Industries Ltd. (September 9, 1988), unreported (MacLellan).

DECISION: 88-140

Halifax (City) AND Halifax Civic Workers' Union, Local 108

Downie, R.J. - Chair; Moreash, Michael H.; Ross, Joseph

Charles MacDougall, for the Union
Gerald Goneau and Barry Allen, for the Employer

July 8, 1988

ISSUES: Adjournments 3:2300; Procedure - Order of proceeding - Generally 3:2650.

CIRCUMSTANCES: The hearing was convened as scheduled, but there was no representation for the Grievor or the Union. The Panel advised an adjournment, but the Employer objected on grounds the matter had been outstanding for some time and the hearing had been set for five months.

AWARD: The Panel concluded the hearing should be adjourned on terms, with the parties settling a new day by mutual agreement. The adjournment is made on condition the Union pay all related costs for the aborted hearing. If such are not paid, then the adjournment is not granted and the grievance fails.

DECISION: 88-141

Cumberland District School Board AND Canadian Union of Public Employees, Local 1523

Evans, Lawrence K. - Chair; Tynes, Michael; Leefe, James

Alex Somerville, for the Union
David Gruchy, for the Employer

December 20, 1988

ISSUES: Discipline and discharge - Grounds for - Work performance - Culpable incompetence 7:3510; Evidence - Burden of proof - Applications - Discipline 3:2411; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000, - Culminating incident 7:4310, - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor is a caretaker at a school. He was dismissed from his position for alleged poor performance of his duties. The Grievor had been given one written warning regarding his performance, and was dismissed six weeks later after the Employer found further evidence of his poor performance. The Union claims the Grievor was wrongfully dismissed and requests reinstatement with restitution of all lost pay and benefits.

AWARD: The grievance succeeds in part. The Board is satisfied that there were sufficient grounds for the imposition of discipline by the Employer, but finds the Employer's attempt to justify its discipline on the basis of a culminating incident inadequate and unfair. The decision to discharge the Grievor is found to be unfair and unreasonable, and must be substituted with a 13-day suspension.

AUTHORITIES: [Brown and Beatty], Canadian Labour Arbitration (3rd ed.) pp 7-84.

DECISION: 88-142

Northside Victoria District School Board AND Canadian Union of Public Employees, Local 981

Ferguson, Robert F. - Arbitrator

Gerald Yetman, for the Union
David J. Ryan, for the Employer

November 2, 1988

ISSUES: Working hours and shifts - Reduction of hours 6:2210; Seniority - Applications 6:2000; Management rights 4:2300; Management rights - Job standard 4:2310; Work assignment - Contracting out - Employees outside unit 5:1400.

CIRCUMSTANCES: There are two related grievances involved in this award. In the first, two Grievors who are school cafeteria workers, claim their hours of work were reduced to accommodate another employee. They ask that their hours of work be increased to their former level and claim payment for any hours of work lost to them. The Employer had restructured the operation of the cafeteria to become more cost effective and in the process, required fewer hours from the employees. The Employer asserts no other employee was involved in the reduction of the Grievors' hours. The second grievance is one of policy in which the Union alleges the operation of the school canteen by student council contributed to the reduction of hours for several members of the bargaining unit. They request that the canteen again be staffed by bargaining unit employees and that any lost time or opportunity be compensated to any employee involved. The Employer states the operation of the canteen was transferred from the students to the Employer with no increase in hours of cafeteria workers. After two years of operating the canteen, the decision was made to give the operation back to the students, possibly as part of the above-mentioned restructuring. There was no effect on the hours of work of the cafeteria staff.

AWARD: The first grievance fails. The collective agreement states that cafeteria workers may work either 8 or 5 hours per day, and therefore the reduction in the Grievors' hours is within the Employer's rights. The Board also found the Employer was operating within its management rights and did so in a fair and reasonable manner. The second grievance fails. The Board found the Employer operated the canteen for two years in a manner that did not provide any additional positions or added hours to those presently employed. The Board is satisfied that there was no connection between the reduction in hours of the cafeteria staff and the closure of the canteen.

Part 1B

GRIEVANCE ARBITRATION DECISIONS

1989

DECISION: 89-001

Construction Aggregates Ltd. AND International Union of Operating Engineers, Local 721

MacLellan, J.A. - Arbitrator

Gordon Forsythe, for the Union
John Plowman, for the Employer

January 3, 1989

ISSUES: Job classification and description - Creation or revision - Change of work load/Job function 5:2410; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievors have been performing work of Crusher Operators, and wish to be reclassified as Operators from their current positions as Crusher Helpers with an appropriate increase in wages. They allege the employer has failed to recognize their actual work status. The Employer maintains there is only one Crusher Operator per shift, and that the Helper's role is clearly defined: learning to operate the crusher is part of the Helper's job, but ultimate responsibility rests with the Operator. The current situation whereby the Helpers operate the crusher almost half of the time is a private arrangement between the Operators and the Helpers, and has not been sanctioned by the Employer.

AWARD: The grievance fails. The evidence indicates that although the routine work which the Crusher Operator and Helpers share seems very similiar, the responsibility for the equipment rests solely with the Operator. However, the two Grievors are competent and capable employees and the Employer may need to reassess their classifications in the near future.

DECISION: 89-002

Sobeys Inc. AND National Automobile Aerospace and Agricultural Implement Workers Union of Canada

MacLellan, J.A. - Arbitrator

Larry Wark, for the Union
Donald McDougall, John Rogers, for the Employer

January 11, 1989

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310; Disciplinary penalties - Reasonableness 7:4300, - Mitigating factors - Employment record 7:4428.

CIRCUMSTANCES: The Grievor is a meat cutter who was suspended for three months without pay after being observed eating one of the Employer's meat products without paying for it. The Union alleges the suspension was without just cause because other employees, including management staff, sample meat products from time to time. The Union requests the Grievor be reinstated and fully compensated for all lost time and wages, and that the incident be removed from the Grievor's record. The Employer asserts that management staff seen sampling meat products are doing so for purposes of quality control. The Employer's policy regarding theft of any amount of product is clear; the Grievor was aware of the policy and chose to violate it.

AWARD: The grievance fails. The issue in this case is to determine whether the suspension was appropriate, as the Grievor admitted to eating the meat product. The Employer has recognized the long service of the Grievor by suspending him rather than terminating his employment. The Arbitrator found this penalty to be appropriate under the circumstances.

DECISION: 89-003

Stellarton (Town) AND Police Assn. of Nova Scotia, Local 205

McDougall, R. Lorne - Arbitrator

David Fisher, for the Union
John B. Baker, for the Employer

January 16, 1989

ISSUES: Wages 8:1000 - Alteration of wages 8:1400; Interpretation - Intention of the parties 4:2100 .

CIRCUMSTANCES: The Union alleges the Employer has not been paying salaries in accordance with the collective agreement. In certain years the Employer is dividing the salaries into 27 parts rather than 26; the result is a change in the rate of pay. The Employer maintains the Grievors are paid on the basis of annual salaries, paid every second Friday.

AWARD: The grievance fails. The Grievors are paid on the basis of annual salaries, applied over two-week pay periods. In certain years this results in the division of the annual salary by 27 rather than the customery 26. The Employer has not violated the collective agreement with respect to this method of payment. However, the Board advises both parties to resolve the problem in future negotiation.

AUTHORITIES: Re Lynwood and Norwood. Auxiliary Hospitals and Canadian Union of Public Employees, Local 1043 and 1158, (1973) 3 L.A.C. (2d) 337 at page 338. Re the Valley Health Services Association and the Nova Scotia Nurses' Union, (1983), (S.B. Outhouse et al), unreported. pp 15 and 16. Re Workers' Compensation Board (New Brunswick) and Pat Allaby et al, (1987), (G.C. Collier), unreported. Re City of Fredericton and Canadian Union of Public Employees, Local 1709, (1988) (D.C. Stanley), unreported.

DECISION: 89-004

Nova Scotia Armature Works Ltd. AND International Brotherhood of Electrical Workers, Local 625

MacLellan, J.A. - Arbitrator

Fern Tardif, for the Union
Don Merson, for the Employer

January 19, 1989

ISSUES: Interpretation - Words and phrases - Measurement of time - Day or work day 4:2100, - Shift 5:3100; Bereavement Leave 8:3510.

CIRCUMSTANCES: The Grievor claims the Employer should have paid him for one more day of bereavement leave. The Union argues that Saturday and Sunday should be excluded from the calculation of the three consecutive days specified in the Collective Agreement. The Employer maintains the the Collective Agreement states the Grievor is to be paid for three consecutive days including weekends, not three working days.

AWARD: The grievance fails. The use of the word "day" in the collective agreement refers to "calender days" and not "working days". Therefore the Grievor is not entitled to bereavement pay for the additional day.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration (2nd ed.) p. 191.

DECISION: 89-005

Phillips Cable Ltd. AND International Brotherhood of Electrical Workers, Local 625

MacDougall, R. Lorne - Chair; Jewers, Wallace; Durnford,Eric

Fern Tardif, for the Union
John Plowman, for the Employer

January 17, 1989

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612; Disciplinary penalties - Reasonableness 7:4300, - Mitigating factors - Employment record 7:4428, - Types of penalties - Multiple penalties 7:4240.

CIRCUMSTANCES: When informed of a change in his work shift, the Grievor lost his temper and was sent home from work. He received a written warning and was suspended for two days as a result of the incident. The Union claims the discipline was too severe and should be reduced to a written warning. After reviewing the situation, the Employer reduced the penalty to the written warning and a one-day suspension due to the Grievor's good work record.

AWARD: The grievance succeeds in part. The evidence indicates the Grievor's behaviour warranted some discipline. The penalty of a one-day suspension shall remain, and the written warning shall be withdrawn and removed from the Grievor's record.

DECISION: 89-006

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Chair; North, Gregory I.; Hebert, Norman

Blaise MacDonald, for the Union
Marian Tyson, for the Employer

January 12, 1989

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, - Work Performance - Carelessness 7:3510, Culpable Incompetence 7:3510, - Just Cause 7:1200; Disciplinary Penalties - Reasonableness 7:4300, - Mitigating Factors 7:4400.

CIRCUMSTANCES: The Grievor was operating a front-end loader when he hit a car parked along the roadway. The Employer blamed the Grievor for the incident and suspended him for five days without pay. The Grievor claims the discipline is without just cause and asks that the penalty be removed from his record and that he be reimbursed for all lost wages, seniority and benefits. The Union argued the Grievor is part of the Construction Team and is therefore not solely responsible for the incident.

AWARD: The grievance fails. The majority found the Grievor was responsible for the accident because he was aware of the parked vehicle and had successfully passed by it 8 to 10 times. The majority rejected the Union's arguments regarding voluntary malfeasance and culpability and interpreted the incident in terms of negligence. The task the Grievor was carrying out was not inherently dangerous or difficult; the Grievor was simply not paying sufficient attention to the parked car. The Majority agreed that the discipline imposed was appropriate in the circumstances.

DISSENT: (Hebert) The grievance should be allowed, the Grievor compensated for all losses, and the letter of discipline removed from his file. The grievor's predicament is largely caused by the decisions made by his forman who did not adequately meet the standard of care required to this situation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration [2nd ed.] para. 7:3510 at p. 411; para 7:3520. Geddry v. MacKay and Hart (1975), 11 N.S.R. (2d) 21 at p. 31 per MacDonald, J.A. Harrison et al v. Bourn, [1958] S.C.R. 733.

DECISION: 89-007

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Chair; North, Gregory I.; Mitchell, Glen

Blaise MacDonald, for the Union
Jonathan Davies, for the Employer

January 12, 1989

ISSUES: Skill and ability - 6:3000; Evidence - Burden of proof 3:2400; Work assignment - Contracting out - Improper assignment within unit 5:2000.

CIRCUMSTANCES: The Grievor claims he was discriminated against in relation to a work assignment by his Superintendent. The Grievor alleges the Superintendent had offered him extra hours on the loader. When the Superintendent was informed of the Grievor's political affiliation by another employee, the work assignment was changed in favour of this other employee. The Grievor claims compensation for lost wages and benefits due to this change.

AWARD: The grievance succeeds. The Majority found the Employer had discriminated against the Grievor by reason of his political affiliation. The Employer is ordered to compensate the Grievor for lost wages. The Majority also argued that the other employee benefitted at the expense of the Grievor by introducing and pursuing matters relating to the Grievor's political affiliation, and in effect influenced the decision of the Superintendent.

DISSENT: (North) The grievance should be dismissed. This case is really a dispute between two strong-willed employees competing with each other for a job within the company. Politics had little if anything to do with problems in this case.

AUTHORITIES: Himmelman, November 25, 1986, at pp. 25-26. Canadian Union of Public Employees, Local 1867 and Department of Highways of Nova Scotia, (unreported, Outhouse), February 13, 1985. Nova Scotia Government Employees Association and Nova Scotia Civil Service Commission (unreported April 14, 1988, Cotter) at p. 21-22. Sopinka and Lederman, The Law of Evidence in Civil Cases (1984), p. 390-391. Dixon, J. Briginshaw v. Briginshaw. Regina v. St. Stephen Woodworking Ltd. (1972), 30 D.L.R. (3a) 602. New Brunswick Labour Relations Act. Regina v. Bushnell Communications Ltd. et al (1973), 45 D.L.R. (3d) 218. Canada Labour Code. Canadair Ltd. v. The King [1948] 1 D.L.R. 434 (Que. C.A.). Society Brand Clothes Ltd. c. The King [1943] 1 D.L.R. 111 (Que. C.A.) Criminal Code, 1953-1954 c. 51, s. 367. Trade Union Act. s. 51. Usen Fisheries Ltd. (unreported L.R.B. 2319, Oct. 15, 1976). Nova Scotia Government Employees Union v. Scaravelli and Liquor Commission (N.S) (1985), 69 N.S.R. (2d) 353. Adams, George, Canadian Labour Arbitration. (1985) p. 489-90. Canadian Dictionary of the English Language.

DECISION: 89-008

Cape Breton Correctional Center AND Police Assn. of Nova Scotia

MacDougall, R. Lorne - Chair; MacDougall, Charles A.; Durnford, Eric B.

David W. Fisher, for the Union
Marian F.H. Tyson, for the Employer

January 6, 1989

ISSUES: Statutory holidays - Work on day of holiday 8:3130; Interpretation - Words and phrases - Day or work day 4:2100; Evidence - Types of evidence - Extrinsic evidence - Past practice 3:4430; Estoppel 2:2220.

CIRCUMSTANCES: The Grievors claim an additional eight hours pay for working on a statutory holiday. The Union claims the collective agreement provides for regular pay for working a holiday plus another day off or pay in lieu, plus an additional eight hours pay. The Employer argues the collective agreement provides for regular pay or eight hours off for each statutory holiday worked. Employees working twelve - hour shifts on holidays are entitled to eight hours additional compensation.

AWARD: The grievance fails. The Board found no ambiguity in the collective agreement as interpreted by the Employer. Furthermore, the Union has acquiesced to the past practice of the Employer in its method of payment for the holidays over the last several years.

AUTHORITIES: Re Canadian National Railway Co. and Beatty et al. (1981) 128 D.L.R. (3rd) 236. Denning, L.J. in Combe v. Combe, [1951] 1 All E.R. 767 at p. 770. Canada Labour Code s.144. Corrections Act, S.N.S., 1966, c.6, s.6 (13). Brown and Beatty, Canadian Labour Arbitration (2d), at. p. 158/9.

DECISION: 89-009

Cape Breton Regional Transit Authority AND Canadian Brotherhood of Railway, Transport, and General Workers, Local 230

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Guy LaFosse, for the Employer

January 20, 1989

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310, 7:3314; Disciplinary penalties - Reasonableness 7:4300, - Mitigating factors 7:4400.

CIRCUMSTANCES: The grievors were dismissed after being observed stealing gasoline from the Employer's vehicles. The Grievors admitted to theft of company property but feel that termination was too harsh a penalty and their dismissal was unjust. The Employer states its policy is clear. Theft of company property would result in immediate discharge.

AWARD: The grievance fails. The evidence indicates the Grievors were involved in premeditated, continuous and extensive theft of company property. The discharge was just and reasonable in the circumstances, and the deterrence factor not withstanding, there is nothing by way of mitigation which would allow the alteration of the imposed discipline.

AUTHORITIES: Re: U.S.W., Local 3257 and The Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 (Reville). Re: Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510, 6 L.A.C. (2d) p. 35 at p. 50.

DECISION: 89-010

Crossley Carpet Mills Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

Darby, Peter E. - Chair; Nichols, Arthur; LeBlanc, Normand

Ted Powell, for the Union
James C. Leefe, for the Employer

January 18, 1989

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions - 7:3610, - Health and safety 7:3621; Management rights - Job standard 4:2310; Job classifications and descriptions - Creations and revision - Transfer of work between 5:2000.

CIRCUMSTANCES: The grievors are weavers in a carpet mill. They received a written warning and suspensions for the remainder of their shifts plus one day for refusing to operate a sample loom when asked to do so by the shift supervisor. Three of the four grievors had not used the sample loom and refused on the basis of unfamiliarity with the equipment and safety considerations. The fourth grievor had used the loom but also refused. The grievors claim it was unsafe practice to require them to do the work not in their classifications, especially when there was a person available who was trained to work the loom. In addition, a temporary transfer could have been applied to one of the employees to carry out the work. The Union, alleging the grievors had the right to refuse to operate the loom because of the safety factor, seeks removal of the discipline.

AWARD: The grievance succeeds in part. The majority found the grievors had no reasonable cause to believe that operation of the sample loom was unsafe. However, the penalty imposed was found to be too severe. A one day suspension is an appropriate disciplinary penalty in this case and the grievors will be compensated for the shift in which they were sent home.

DISSENT: (LeBlanc) No written dissent

AUTHORITIES: Occupational Health and Safety Act, S.N.S. 1985 C. 3, s.22(1). D.J. Brown and D.M. Beatty, Canadian Labour Arbitration (2nd ed.) 1984, Canada Law Book, p. 443. Palmer, E.E., Collective Agreement Arbitration in Canada (2nd ed. 1984) Butterworths, at pp. 325-8. Re Beachvilime Ltd. and Energy and Chemical Workers Union, Local 32 (1981) 1 L.A.C. (3d) 22 at pp. 28-9. Steel Co. of Canada Ltd. (1973), 4 L.A.C. (2d) 315 (Johnson). Occupational Health and Safety Act, R.S.O. 1980, C. 321. Re Eastern Steelcasting and U.S.W., Local 8794 (1981), 28 L.A.C. (2d) 310 (Adell), p. 312.

DECISION: 89-011

Rahey's Supermarket AND Retail, Wholesale and Department Store Union, Local 596

MacDonald, David J. - Arbitrator

John B. Campbell, for the Union
Bernard Leviten, for the Employer

February 1, 1989

ISSUES: Vacation 8:3210, - Computation of vacation and vacation pay 8:3220, 8:3230, Sick 8:3330; Seniority - Acquisition - Non-working periods 6:1110; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The grievor claims the Employer has not paid him the correct vacation pay. The Union asserts that the sole criterion in determining entitlement to vacation with pay is completion of service; this entitlement is not affected by the grievor's absence on sick leave. The Employer argues that an employee must earn the right to vacation pay by putting in the prescribed hours and qualifying time, and this is not covered by time off for sick leave. Therefore, the normal provisions for vacation pay are negated during sick leave.

AWARD: The grievance succeeds. There is no evidence in the Collective Agreement to support the position that vacation entitlement is reduced due to absence from work. The grievor is entitled to four weeks vacation, three with full vacation pay. The Employer is directed to pay the grievor the amount owed, less undisputed deductions.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d), ss. 6:1110, 8:3220. Palmer, E.E. Collective Agreement Arbitration in Canada p. 697. Re: Union Gas Ltd. and Oil. Chemical and Atomic Workers International, Union Local 9-758 27 L.A.C. (2d) p. 72.

DECISION: 89-012

Municipal Contracting Ltd. AND International Union of Operating Engineers, Local 721

MacLellan, J.A. - Arbitrator

Ronald Pink, for the Union
Eric Durnford, for the Employer

February 3, 1989

ISSUES: Arbitrability - Agreement expired 4:1620; Statutes - Applied by boards of arbitration 2:2100; Evidence - Burden of proof 3:2400, - Types of evidence - Extrinsic evidence 3:4400.

CIRCUMSTANCES: The Employer and the Union do not have a current Collective Agreement. However, the Union and the Construction Labour Management Bureau do have a valid Collective Agreement. The Union alleges that work done by the Employer is work in the Trade "Industrial and Commercial" sector as mentioned in the Trade Union Act. They argue that the Employer must therefore abide by the agreement between the Union and the Construction Labour Management Bureau. The Employer argues that the work done is in the "road building" sector which excludes it from the above agreement.

AWARD: The grievance fails. After presenting considerable evidence, the Union has not established that the work carried on by the Employer was in the "Industrial and Commercial" sector. The evidence indicates that the work is in the "Road Building" sector.

AUTHORITIES: Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (1969) 1 O.R. 469, Ontario High Court, Gale, C.J.O., pp. 523-4. Labour Canada. Labour Conditions. International Union of Operating Engineers, Local 721 and Municipal Spraying Contracting Limited (August 1, 1985). International Union of Operating Engineers, Local 721 and Standard Paving Limited (July 22, 1988).

DECISION: 89-013

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Venoit, Milton J. - Arbitrator

Blaise MacDonald, for the Union
Jonathan Davies, for the Employer

February 7, 1989

ISSUES: Recall 6:2354; Seniority - Shift assignment 6:2000.

CIRCUMSTANCES: The grievor claimed that he was passed over for recall, and a less senior employee recalled.

AWARD: The grievance succeeds. The grievor is to be placed seven hours ahead of the other employee on both the work group seniority list and the length of service list.

DECISION: 89-014

Bill G. & John's Electric AND International Brotherhood of Electrical Workers, Local 625

Demont, Eric G. - Arbitrator

Fern Tardif, for the Union
Michael C. Moore, for the Employer

February 9, 1989

ISSUES: Wages 8:1000.

CIRCUMSTANCES: This arbitration order involves a dispute regarding the rate of wages owed by the Employer. Both parties agree the Employer owes money to the employees.

AWARD: The Employer is ordered to pay the Union an established amount according to the schedule specified in the order.

DECISION: 89-015

Cape Breton (Municipality of the County) AND Canadian Union of Public Employees, Local 1545

MacDonald, David J. - Arbitrator

James Crosby, for the Union
David Muise, for the Employer

February 20, 1989

ISSUES: Collective agreement - Term of operation 4:1620, Retroactivity 2:1200, 4:1610; Decisions of other boards of arbitration - Applications - Aid to interpretation 4:2220; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The parties completed negotiations and agreed to terms of a new collective agreement some time after the expiration of the term of the old agreement. A dispute arose over the effective date of an article on payments and wages. The agreement is silent as to the effective date of the article. The Union argues that the article has an effective date retroactive to the first day of the new agreement. The employer argues that the article will not become effective until the signing of the new agreement, and that it was never their intention that this item be effective retroactively.

AWARD: The grievance succeeds. The Arbitrator found that monetary items are generally retroactive under the general terms of the arbitral evidence studied. Therefore, the Union's expectation that the article would be in effect retroactively is a reasonable one. For this article to escape inclusion in the general retroactivity of the duration clause, specific language or designation is necessary.

AUTHORITIES: United Automobile, Aircraft & Agricultural Implement Workers of America, in Re: Canadian Gas & Foundry Co. Ltd. (December 31,1954) L.A.C. 31-12-54 p. 1771. Re Canadian Union of Public Employees, Local 4, and Public Utilities Commission of the City of London (August 17, 1965) 16 L.A.C. p. 182. Re International Chemical Workers, Local 412, and Penwick Canada Ltd. (August 9, 1966) 17 L.A.C. p. 296. Re Hotels & Restaurant Employees & Bartenders International Union, Local 299, & Sheraton Ltd. (July 26, 1967) 18 L.A.C. p. 292. Re Teamsters Union, Local 91, 141, 879, 880 & 938 and Motor Transport Industrial Relations Bureau of Ontario (January 27, 1969) 20 L.A.C. p. 140. Re Service Employees' Union Local 204 and Toronto Hospital for the Treatment of Tuberculosis, (October 8, 1970) 22 L.A.C. p. 119. Re Sturgeon General Hospital and C.U.P.E., Local 1335 (September 4, 1974) 6 L.A.C. (2d) p. 360. Re Penticton and District Retirement Service and Hospital Employees Union, Local 180 (February 9, 1977) 16 L.A.C. (2d) p. 97. Re Nova Scotia Liquor Commission and Association of Commercial and Technical Employees, Local 1670

(June 5, 1980) 29 L.A.C. (2d) p. 284. Re Bestview Holdings Ltd., Cornwall, and Ontario Nurses Association (July 8, 1981) 1 L.A.C. (3d) p. 218. Re Abitibi-Price and Canadian Paperworkers Union, Local 134 (September 9, 1981) 1 L.A.C. (3d) p. 193. Re Bell Canada and Communications Workers of Canada (May 30, 1984) 15 L.A.C. (3d) p. 27. Brown and Beatty. Canadian Labour Arbitration (2d), p. 184.

DECISION: 89-016

Sydney (City) AND Canadian Union of Public Employees, Local 933

Outhouse, Bruce - Chair; Pickford, Tom; MacKay, Duncan

Kevin MacNeil, for the Union
Robin Campbell, for the Employer

February 27, 1989

ISSUES: Job classification and descriptions - Creation or revision 5:2000, Change of work load/job function 5:2410; Management rights 5:0000.

CIRCUMSTANCES: The Grievor was transferred into another department and assigned some additional responsibilities. After some time the Grievor requested a reclassification or a salary scale adjustment, both were rejected by the Employer. The Union argues that the Grievor's duties have been substantially increased and he is entitled to a wage upgrade. They request he receive a salary increase retroactive to his date of application for the increase. The Employer argues that no salary scale adjustment is warranted, as there has been no increase in the Grievor's duties. The Employer also argues its decision to deny the Grievor's request should not be disturbed by the Board unless it is found to be malicious, arbitrary, or unreasonable.

AWARD: The grievance fails. The Board found there was no substantial increase in the Grievor's duties, justifying an adjustment in salary. The additional duties the Grievor did assume with the transfer were routine and did not add anything to his job in terms of ability or skill requirements.

DECISION: 89-017

Sydney (City) AND Canadian Union of Public Employees, Local 933

Outhouse, Bruce - Chair; Pickford, Tom; MacKay, Duncan

Kevin MacNeil, for the Union
Robin Campbell, for the Employer

January 27, 1989

ISSUES: Union - Security - Check off 9:1200; Bargaining unit - Definition 5:1100, - Employees excluded - Temporary, casual or part-time 5:1124; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: This policy grievance involves the status of a casual employee and the Employer's failure to deduct and remit Union dues. The Union argues that the Employees work is within the scope of the bargaining unit and that she should be one of its members. The Union requests that the Employer compensate it for all dues which ought to have been paid to it on the Employee's behalf. The Employer argues that the Union has failed to prove its case because its evidence is too vague.

AWARD: The grievance succeeds. The Union's evidence, although sparse, is uncontradicted regarding the bargaining unit work performed by the Employee. The Employer is ordered to pay dues to the Union with respect to all periods in which bargaining unit work was performed.

DECISION: 89-018

Sydney (City) AND Canadian Union of Public Employees, Local 933

Outhouse, Bruce - Chair; Pickford, Tom; MacKay, Duncan

Kevin MacNeil, for the Union
Robin Campbell, for the Employer

February 27, 1989

ISSUES: Job classifications and descriptions - Creation or revision 5:2000 - Change of work load/job function 5:2410, - Performance of work outside - Burden of proof 3:2414; Management rights - Classification 5:2200.

CIRCUMSTANCES: The grievor is solely responsible for delivering a federally sponsored program, for which the work load has allegedly increased over the past few years. The Union alleges that the Grievor's duties have been substantially increased by management without a corresponding increase in pay; they also allege the Grievor's position is improperly classified. The Union requests that her annual salary be increased to a more senior classification. The Employer argues that the Grievor's present classification is appropriate and that there has been no substantial increase in duties or work load.

AWARD: The grievance fails. The Board found the Union had not demonstrated a substantial increase in the duties of the Grievor's position or that the original classification was improper.

DECISION: 89-019

Sydney (City) AND Canadian Union of Public Employees, Local 933

Outhouse, Bruce - Chair; Pickford, Tom; MacKay, Duncan

Kevin MacNeil, for the Union
Robin Campbell, for the Employer

February 27, 1989

ISSUES: Wages - Arbitration of rates 8:1000; Job classifications and descriptions - Creation or revision 5:2000 - Burden of proof 3:2414.

CIRCUMSTANCES: This policy grievance involves the classification of a new position created by the Employer. Both parties agreed the position was within the Union's jurisdiction; they also agreed upon how the position was to be filled. However, they were unable to agree on salary. The Union argues the Employer has underrated this position and its level of responsibility, and that the incumbent be paid at a higher rate retroactive to the date of her appointment.

AWARD: The grievance succeeds. The Union presented evidence regarding her duties and responsibilities of this position, and justified their case for classification. The Employer is directed to pay the incumbent at the rate of pay she would have earned if she had been classified at the higher level, retroactive to the date of her appointment.

DECISION: 89-020

Allen's Dairy Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

Darby, Peter E. - Arbitrator

Roseanne Skoke, for the Union
James C. Leefe, for the Employer

March 7, 1989

ISSUES: Interpretation - Words and phrases - Jobs and classifications 5:2000, - Intention of the parties 4:2100; Wages - Performance of work outside classification 5:2420.

CIRCUMSTANCES: The two grievors are employed as spare drivers. They allege the Employer failed to pay them the higher rate of driver-salesmen when they were temporarily assigned to those positions. The Employer argues the core function of a spare driver is to be available to carry out the work of a driver-salesman during any short-term absences of the latter. Furthermore, as the position of spare driver exists only to perform the functions of a driver-salesman when necessary, they are not being "temporarily assigned" within the definition of the collective agreement.

AWARD: The grievance fails. There can be no temporary assignment of spare drivers to driver salesmen within the meaning of the collective agreement, as the central core function of the job of the former is to fulfill the duties of the latter in the short term.

DECISION: 89-021

Glace Bay (Town) AND Police Assn. of Nova Scotia

Scaravelli, N.M. - Chair; MacIntyre, Leo; MacDougall, Charles

David Fisher, for the Union
Reeves Matheson, for the Employer

March 17, 1989

ISSUES: Bargaining unit - Definition 5:1100, - Employees excluded 5:1120; Union - Recognition 9:1100.

CIRCUMSTANCES: The Union grieves that the Employer has failed to recognize the position of inspector as a bargaining unit position. The Union seeks an order declaring this position be part of the bargaining unit, and a further order requiring the Employer to deduct union dues and other deductions as well as paying all back dues and deductions on behalf of the inspector's position. The Employer argues that the inspector is excluded from the bargaining unit as he is employed in a confidential capacity regarding labour relations, and exercises management functions.

AWARD: The grievance fails. The majority found the inspector to be management. The determination that the inspector was an employee in these circumstances would adversely affect the aspect of disclosure of confidential information necessary to maintain an arm's length relationship between employer and employee.

DISSENT: MacDougall argues only the Chief of Police carries out duties of a nature that would exclude the officer from membership in the Union.

AUTHORITIES: The Town of Amherst and the Amherst Police Association, Local 104. Trade Union Act, [R.S.N.S.] s.1 (2) (a). Sack and Levinson, Ontario Labour Relations Board Practice, p. 79, 99. Police Commission Bylaw Amendment, s.4 (b), (c); s.5 (d); s.7 (a), (c), (d); s.9(c). Police Act for the Province of Nova Scotia s.15 (30).

DECISION: 89-022

Glace Bay (Town) AND Police Assn. of Nova Scotia

Scaravelli, N.M. - Chair; MacIntyre, Leo; MacDougall, Charles

David Fisher, for the Union
J. Reeves Matheson, for the Employer

March 27, 1989

ISSUES: Promotion, demotion, and transfer - Promotion defined 6:2100, - Seniority 6:2000, 6:2100; Management Rights 5:0000.

CIRCUMSTANCES: The Grievor was not selected for a position he had applied for despite his seniority over the successful candidate. The Union argues that the appointment to the position constituted a promotion which would require the seniority provisions of the collective agreement to be in force. The Employer maintains the appointment is a lateral tranfer and therefore the seniority provisions do not apply.

AWARD: The grievance fails. The majority found the appointment to be a lateral move by way of transfer or assignment that cannot be construed as a promotion within the context of the collective agreement.

DISSENT: MacDougall argues the grievance should succeed. The seniority clause was put into effect by the posting of the position, and the Grievor should have been awarded the job on the basis of seniority.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2nd ed.) p. 549. Re [Labbett's] Ontario Breweries Ltd. and United Brewery Workers, Local 304 (1973), 2 L.A.C. (2d) 40 (O'Shea) at p. 44.

DECISION: 89-023

Metropolitan Authority (Metro Transit Division) AND Amalgamated Transit Union, Local 508

MacLellan, J.A. - Arbitrator

Kim Turner, for the Union
Amery Boyer, for the Employer

March 21, 1989

ISSUES: Discipline and discharge - Just cause - Other standards 7:1300, - Grounds for - Absence from work - Innocent distinguished 7:3200; Illness or disability - Burden of proof - Employer allegations 7:3250; Disciplinary penalties - Nature of diciplinary sanction 7:4210; Evidence - Types of Evidence - Medical records 7:3250.

CIRCUMSTANCES: The Grievor received a letter from his Employer regarding the frequency and timing of his sick leave. The Grievor alleges the Employer violated the collective agreement by taking disciplinary action against him without just cause. The Employer denied the agreement had been violated.

AWARD: The grievance succeeds. The Arbitrator accepts the Grievor's absences were for legitimate medical reasons. The Employer has failed to discharge the burden of proof placed on it, and the letter is to be removed from the Grievor's file.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3rd ed.) at p. 7-137

DECISION: 89-024

Halifax (City) AND Halifax Police Patrolmen's Assn., Local 110

MacDougall, R. Lorne, Chair; MacDougall, Charles A.; Durnford, Eric B.

David W. Fisher, for the Union
Jan Silliker, for the Employer

March 22, 1989

ISSUES: Collective agreement - Matters arising outside of 2:1200; Interpretation - Intention of the parties 4:2100, - Aids to interpretation - Past practice 2:2220; Estoppel 2:2200, 2:2220; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: The Grievors are police constables who were called back from vacation to appear as witnesses in court. They were given twenty-four hours of leave as compensation. The Union argues the employees are permitted to choose whether they want pay or time off, based on past practice. The Employer asserts the correct interpretation of the Collective Agreement is that three days leave is the only possible compensation for court appearances.

AWARD: The grievance fails. The majority found the language of the Collective Agreement to be clear and unambiguous in that three shifts shall be given in compensation for court appearances. There is no mention of pay, nor is any option given. The Union's argument of past practice is not valid - the fact that a practice exists is not sufficient to attribute to it the force of contract.

DISSENT: Charles MacDougall supports the Union position. His interpretation of the word "compensation" includes pay or time in lieu of pay, and he argues employees should be able to make the choice. He also argued that by denying the grievance, the Board has altered the terms of the Collective Agreement, which is not permissable under grievance procedures.

AUTHORITIES: Re City of Lethbridge and Canadain Union of Public Employees, Local 70 (1986) 26 L.A.C. (3d) 81 at pp. 93-4. Re Ben Ginter Construction Co. Ltd. and International Union of Operating Engineers, Local 115 (1967), 62 D.L.R. (2d) 485, 67 C.L.L.C 154 (B.C.S.C.). Re Victoria Times Colonist and Victoria Newspaper Guild, (1984), 17 L.A.C. (3d) 284 at pp. 293-4. Re CN/CP Telecommunications and Canadian Telecommunications Union, (1981), 4 L.A.C. (3d) 236, 82 C.L.L.C. para. 14,163, 34 O.R. (2d) 385 (Ont. Dev. Ct.). Brown and Beatty: Canadian Labour Arbitration (3d) at p. 2-44. Black's Law Dictionary (5d). Re Victoria Hospital Corporation and London and District Service Workers' Union, Local 20 (1982) 4 L.A.C. (3d) 193 at 203. Re Dominion Consolidated Truck Lines Ltd. and Teamsters Union, Local 141 (1980), 28 L.A.C. (2d) 45. Re International Assoc. of Machinists Local 1740 and John Bertram and Sons Co. Ltd. (1967), 18 L.A.C. 362. Palmer, E.E. Collective Agreement Arbitration in Canada (2d) p. 124-5. Re British Columbia R. Co. and Canadian Union of Transportation Employees, Local 6 (1982), 8 L.A.C. (3d) 250 (Hope). Re International Nickel Co. of Canada Ltd. and U.S.W., Local 6500, 6 L.A.C. (2d) 120 (Simmons) at p. 127. Re Nova Scotia Nurses Union and Eastern Shore Memorial Hospital, (1984), 64 N.S.R. (2d) 160. Hawker Siddeley Canada Inc. Trenton Works Division v. United Steelworkers of America, Local 1231 (1983), 59 N.S.R. (2d), 125 A.P.R. 29, at p. 4.

DECISION: 89-025

Halifax (City) AND Halifax Civic Workers', Local 108

Outhouse, Bruce, Chair; Ross, Joseph; Moreash, Michael

Bruce Evans, for the Union
Gerald Goneau, for the Employer

March 31, 1989

ISSUES: Seniority - Applications - Promotion, demotion and transfer 6:2000, 6:2100, Layoff 6:2200; Skill and ability - Criteria of ability and qualifications - Examinations and tests 6:3340; Lay-off - Bumping 6:2330, - Upwards 6:2340.

CIRCUMSTANCES: The Union alleges that Grievor A should have been appointed to the position of Chauffeur A in preference to two junior employees as in its view he had the required qualifications for the position. The Union argues that the Grievor was unfairly tested for his Class I license and asks that the results be set aside and he be awarded the position, plus compensation for any loss of pay. In addition, the Union claims Grievors B, C, and D were laid off when they are qualified to be performing work done by two junior employees. In the event that Grievor A succeeds, the remedy requested by the Union is the most senior of the other Grievors who is found to be qualified to bump into the remaining Chauffeur A position should be awarded compensation from the date of his layoff to the date of recall. In the event that Grievor A fails, then the two most senior grievors who are found to be qualified to bump into the Chauffeur A positions should be so compensated. The Employer takes the position that Grievor A lacked the required qualifications for the Chauffeur position because he had failed the road test for the appropriate license. Furthermore, Grievors B, C and D lacked the necessary experience driving tandem trucks and heavy equipment which was required in order for them to be bumped into Chauffeur A positions.

AWARD: The grievances fail. The Board agreed with the Employer that Grievor A did not possess the required qualifications for the position because of his failure to pass the Class I license road test. The Union's arguments that the test was unfair were discounted. The Board also found that Grievors B, C, and D were not qualified to bump the junior employees because they lacked the ability and experience to perform the work in question.

AUTHORITIES: Re Canadian Broadcasting Corporation and National Association of Broadcast Employees and Technicians (1985), 17 L.A.C. (3d) 353 (M.G. Picher). Re U.A.W., Local 984, and York Gears Limited (1969), 20 L.A.C. 302 (Christie). Re Children's Aid Society of Metropolitan Toronto and Staff Association of the Children's Aid Society of Metropolitan Toronto (1979), 24 L.A.C. (2d) 206 (Adams). Re Halifax Civic Workers, Local 108 and City of Halifax (April 22, 1987), unreported (Cotter).

DECISION: 89-026

Metropolitan Authority AND Amalgamated Transit Union, Local 508

Cotter, W. Brent - Arbitrator

Kimberley H.W. Turner, for the Union
Amery Boyer, for the Employer

March 24, 1989

ISSUES: Probationary employees 7:5000 - Probationary period 7:5010; Employee - Defined 5:1122; Interpretation - Intention of the parties 4:2100; Arbitrability - Probationary employees 2:1100.

CIRCUMSTANCES: The Grievor commenced employment on a part-time basis, and eventually fulfilled the probation requirements to become a "permanent" employee. The Grievor then applied for and was awarded a full-time position. At that time he was told by the Employer he was considered to be a new employee and therefore forfeited all seniority he had accrued as a part-time employee; he was also subject to another probationary period. After four months, the Grievor was terminated from his position. The Union's preliminary objection rejects the terms set by the Employer upon granting the Grievor the full-time position. The Union's position is that the Grievor was a permanent employee at the time of his dismissal because he has acquired that status as a part-time employee. The Employer maintains the Grievor was a probationary employee at the time of his dismissal. They claim that the Grievor gave up his status as a permanent part-time employee to become a probationary full-time employee.

AWARD: Because of the nature of the decision would differ radically depending on which interpretation of the Grievor's status is correct, the Arbitrator agreed to hear argument on this issue and decide upon it before proceeding. The preliminary objection is dismissed. The Collective Agreement is interpreted to mean that employees who move from part-time to full-time status lose their accrued seniority when taking up their new position. They do not lose their entitlement to status as permanent employees. There is no reason why the employee should be required to prove himself a second time, particularly when the employee is moving from part time to full time in the same capacity

AUTHORITIES: Re Dominion Stores Ltd. and Retail, Wholesale and Department Stores Union, Local 414 (1981), 30 L.A.C. (2d) 194 (Brunner).

DECISION: 89-027

Laurence Sweeney Fisheries Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 611

Outhouse, Bruce - Arbitrator

Ray Larkin, for the Union
Karin McCaskill, for the Employer

April 11, 1989

ISSUES: Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000; Obey now, grieve later 7:3610; Discipline and discharge - Just cause - Other standards 7:1300; Working hours and shifts 5:3100.

CIRCUMSTANCES: The Grievors are crew members on a scallop dragger which returned to port due to the captain's illness. They expected to have the night ashore, but the Employer provided a replacement for the captain and told the crew to stay on board. Seven crew members left the ship for the night and were subsequently fined and suspended. The Union alleges the Grievors were disciplined without just cause and requests that suspensions and fines be rescinded and that all record of the discipline be removed from the grievors' files. The Employer argues that the Grievors were given clear instructions to sail, and if they disagreed with the Employer's interpretation of the collective agreement, they should have obeyed the orders and challenged the order through the grievance process.

AWARD: The grievance succeeds in part. The Employer failed to give written notice of suspension to two of the Grievors, which renders them nullities. Furthermore, the Employer did not have the authority to fine the Grievors under the circumstances. However, the Employer did have just cause for disciplining the Grievors by reason of their refusal to follow their captain's orders. Having rescinded the fines, the Arbitrator substitutes the penalty of a written reprimand which will be the only formal record of discipline.

AUTHORITIES: Re CIP Containers Ltd. and International Chemical Workers, Local 229 (1973), 2 L.A.C. (2d) 308 (Brown). Re Valade and Eberlee (1971), 24 D.L.R. (3d) 38 (Ont.C.A.). Re Mirador Motor Inn and Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (1973) 2 L.A.C. (2d) 339 (Abbott). Re International Brotherhood of Electrical Workers, Local Union 1030 and Maritime Telegraph & Telephone Company, Limited (July 15, 1980), unreported (Clarke). Re United Automobile Workers and Truscon Steel Co. of Canada Ltd. (1958), 9 L.A.C. 125 (Lane). Re United Automobile Workers, Local 112 & DeHavilland Ltd. (1956), 7 L.A.C. 37 (Cross). Re H. Fine and Sons Ltd. and Teamsters Union, Local 91 (1984), 15 L.A.C. (3d) 236 (Roach). Labour Standards Code, S.N.S. 1972, C.10, s.76. Re Rimmington V. Le Rendez-Vous Cafe Limited (July 16th, 1986) Unreported (L.S.T. No. 507). Re Turple v. K-Pac Equipment Limited (November 5th, 1987), unreported (L.S.T. No. 570). Re Langille v. Acadia University (June 4th, 1987), unreported (L.S.T. No. 548). Re Farmer et al v. Total Salon Concept Ltd. (May 9th, 1980) unreported (L.S.T. No. 188). Re International Woodworkers of America, Local 2-500, and Stancor Central Ltd. (Peppler Division) (1970), 22 L.A.C. 184 (Weiler). Re British Columbia Telephone Co. Ltd. and Federation of Telephone Workers of British Columbia (1976), 13 L.A.C. (2d) 312 (MacIntyre). Re Dominion Chain Co. (Division of Welland Forge Ltd.) and International Association of Machinists & Aerospace Workers, Local 1927 (1980), 29 L.A.C. (2d) 263 (Teplitsky). Re Meat Connection Inc. and United Food & Commercial Workers, Local 1105P (1985), 23 L.A.C. (3d) 159 (Solomatenko).

DECISION: 89-028

Municipal Ready-Mix Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 1588

Scaravelli, N.M. - Arbitrator

Ronald Pink, for the Union
Jan Silliker, for the Employer

April 20, 1989

ISSUES: Wages - Arbitration of rates 8:1000; Job classifications and descriptions - Bargaining unit work defined by 5:1200; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: The Union claims the Employer failed to pay proper wage rates under the collective agreement for work performed on three job sites. The work was done in the area adjacent to the buildings located on the sites, and the Union maintains this is work within the industrial and commercial sector. The Employer argues the collective agreement is not applicable as the work performed falls under the road building sector of the construction industry and not the industrial and commercial sector.

AWARD: The grievance fails. The Union has failed to discharge the burden of establishing that the work performed falls within the commercial and industrial sector. Therefore the agreement between the parties does not apply.

AUTHORITIES: Labours' International Union of North America, Local 615, and Seaport Contractors Limited, July 5, 1981 (unreported). International Union of Operating Engineers, Local 721 and Municipal Contracting Limited, (Nov. 23/88) (unreported). Ontario [Labour] Relations Act, s. 117 (E), 89 (H).

DECISION: 89-029

Metropolitan Transit Authority AND Amalgamated Transit Union, Local 508

Outhouse, Bruce - Arbitrator

Gordon Forsyth, for the Union
Amery Boyer, for the Employer

April 20, 1989

ISSUES: Jury and witness duty 8:3600; Past practice 3:4430; Interpretation 4:2100.

CIRCUMSTANCES: The Grievor asked for two days leave from work so he could appear in court to contest a traffic ticket. He was granted leave without pay. The Union claims the grievor should have been paid for the days of court appearance and requests that the Grievor be compensated for both days. The Employer interprets the collective agreement as applying only in those circumstances where an employee is subpoenaed as a witness and not as the accused.

AWARD: The grievance fails. The Grievor was not subpoenaed as a witness as set out in the collective agreement, which does not provide for general court leave with pay.

AUTHORITIES: Motor Vehicle Act [R.S.N.S.] s.74 (2)

DECISION: 89-030

Nova Scotia (Solicitor General) AND Police Assn. of Nova Scotia

Veinot, Milton J. - Arbitrator

David W. Fisher, for the Union
Reinhold M. Endres, for the Employer

April 13, 1989

ISSUES: Wages - Arbitration of rates 8:1000, - Retroactivity 8:1300, Increases - Progressive wage increases 8:2320.

CIRCUMSTANCES: This grievance concerns the method for calculating retroactive pay for part-time staff. The Union has chosen to determine the pay based on the full-time equivalent salary divided by 2080 hours. The Employer has chosen an hourly rate appropriate to the type of shift, which results in a lower rate.

AWARD: The grievance succeeds. The Arbitrator found that the method used by the Employer to calculate the retroactive pay was wrong. The Employer shall re-calculate and pay the retroactive pay to the part-time employees for the period in question at the higher rate.

AUTHORITIES: Blacks Legal Dictionary (5th ed., 1979). Hillis v. The Queen (1983), 1 N.R. (Fed. C.A.). Glades Lodge Limited and Canadian Union of Public Employees, Local 1259 (unreported, November 1, 1988).

DECISION: 89-031

Halifax Infirmary Hospital AND Canadian Brotherhood of Railway Transport and General Workers Union, Local 606

Veinot, Milton J. - Arbitrator

Gordon Forsyth, for the Union
Kenneth Fowlie, for the Employer

April 19, 1989

ISSUES: Insurance and welfare plans - Entitlement to benefits 8:3320, - Calculation of benefits 8:3300, - Payment of premiums 8:3310; Overtime 5:3200, - Management rights 5:3210.

CIRCUMSTANCES: The Grievor is a cooks' helper at a hospital. He was asked by management to work on a Saturday and Sunday for which he was not scheduled. He agreed, and worked Saturday but not Sunday, because of illness. The Employer informed him he would not receive sick pay for the Sunday because he was not scheduled for that day. The Union argues that the Grievor was obligated to work once he agreed to work the extra days, and is therefore entitled to compensation. The Employer maintains that sick leave provisions were an income maintenance scheme and that the Grievor is claiming a loss of income on a day in which he ordinarily would have earned none.

AWARD: The grievance succeeds. The Grievor was absent from work for a time for which he was scheduled, and he is therefore entitled to a day's sick pay. The Employer is directed to compensate the Grievor for the one day.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3rd ed., 1988 p. 8:3310).

DECISION: 89-032

Hermes Electronics Ltd. AND International Brotherhood of Electrical Workers, Local 1651

Kydd, William H. - Chair; Simpson, Carl E.; McDougall, Donald H.

Gordon Forsyth, for the Union
Peter MacLellan, for the Employer

April 24, 1989

ISSUES: Bereavement leave 8:3510, - Relationships 8:3520; Interpretation - Personal relationships - Family relationships 8:3520; Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievor has a common-law spouse. When her "spouse's" father died, the Grievor was granted three days bereavement leave. Upon her return to work, she was advised she would not be paid for the three days because she was not legally married, and the collective agreement did not cover leave in those circumstances. The Union alleges the Grievor is entitled to paid bereavement leave and claims three days pay.

AWARD: The grievance fails. The majority found that the language in the collective agreement is restrictive in its meaning and it cannot be inferred that the term "father-in-law" includes the father of a common-law spouse.

DISSENT: Simpson would be more flexible in the interpretation of the authorities presented, especially in view of the closeness of the family relationship in question and the Employer's lack of awareness of the purpose of their bereavement clause.

AUTHORITIES: Re: Genaire Ltd. and Canada Automobile Workers, Local 199 (Weatherhill). Re: North Cariboo Forest Labour Relations Association and International Woodworkers of America, Local 1-424 (1985), 19 L.A.C. (3d) 115 - (Hope). Re: Southern Alberta School Authorities Association (County of Forty Mile No. 8) and Alberta Teachers Association (1981) 5 L.A.C. (3d) 351 (Mason). Re Scherer - G.C. Ltd. and Canadian Food and Allied Workers (1975), 10 L.A.C. (2d) 401 (Kruyer). Re: Beer Precast Concrete Ltd. and Labourers Int'l Union, Local 506 (1984), 15 L.A.C. (3d) 107, p.118. Re: Maple Ridge Hospital & Registered Nurses' Association of British Columbia (1979), 23 L.A.C. (2d) 355 Gill (British Columbia). Re: Board of Health of Regional Municipality of Peel and Ontario Nurses' Association (1983), 9 L.A.C. (3d) 99 Shime (Ontario). Re Alberta Wheat Pool and Grain Workers' Union, Local 333 (1986) 23 L.A.C. 316 Kelleher (B.C.).

DECISION: 89-033

Canadian Liquid Air Ltd. AND United Steelworkers of America, Local 6603

Outhouse, Bruce - Arbitrator

Andy Gillis, for the Union
Greg North, for the Employer

April 28, 1989

ISSUES: Illness or disability - Effect on employee - Ability to do job 7:3220, - Benefits 8:3300, - Burden of proof - Return to work 8:3342; Insurance and welfare plans - Entitlement to benefits 8:3320; Management rights 4:2300; Time-limits - Restriction on arbitrability 2:1100; Medical records 3:4320.

CIRCUMSTANCES: Owing to poor health, the Grievor was not carrying out all his duties prior to an absence due to illness. The Employer reviewed the Grievor's status close to the time at which his disability benefits would end and determined he was not fit to return to work. The Union alleges that the Employer has violated the collective agreement by refusing to allow the Grievor to return to work and requests that he be reinstated to his former position and be compensated for all lost pay and benefits. The Employer argues that the Grievor is not medically fit to return to work. Furthermore, returning him to his position will sacrifice productivity and will place both the Grievor and his co-workers at considerable risk.

AWARD: The grievance fails. The Employer has acted reasonably in refusing to allow the Grievor to return to work because he was medically disabled from performing a significant component of the job. In addition, there was no suitable alternative employment available within the bargaining unit by which the Employer could accommodate the Grievor.

AUTHORITIES: Re United Food & Commercial Workers and Bolands Limited (December 9th, 1987), unreported (Outhouse). Re N.S.G.E.U. and Civil Service Commission (September 1, 1987), unreported (Outhouse). Re Shell Canada Limited and Oil, Chemical and Atomic Workers, Local 9-600 (1973), 3 L.A.C. (2d) 229 (Bellan), rev'd [1974] 1 WWR 660 (Man.Q.B.). Re Kingsway Transports Limited and Teamsters Union, Local 879 (1978), 19 L.A.C. (2d) 180 (Ellis). Brown and Beatty. Canadian Labour Arbitration (3d), p. 2-54; 7-48, 7-49. Re Maritime Telegraph & Telephone Co., Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1984), 16 L.A.C. (3d) 318 (Cotter). Re CIP Inc., Container Division and Canadian Paperworkers Union, Local 343 (1983), 11 L.A.C. (3d) 348 (McLaren). Re Oil, Chemical & Atomic Workers, Local 9-672, and Dow Chemical of Canada Ltd. (1970), 22 L.A.C. 50 (Weatherill).

DECISION: 89-034

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union, Local 470

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Eric Durnford, for the Employer

May 1, 1989

ISSUES: Arbitrability - Matters arising outside of agreement 2:1200; Employee - Defined 5:1122; Bargaining unit - Definition 5:1100; Promotion, demotion and transfer - Seniority 6:2000, 6:2100.

CIRCUMSTANCES: The Employer hired a manager for one of its stores, choosing an employee classified as "casual with benefits" (CWB). The Union claims CWB employees are part of the bargaining unit and the Manager 1 position is the lowest classification in the store; therefore the position had to be filled according to the collective agreement. The Employer argues that the grievance is not arbitrable because the CWB employees are not part of the bargaining unit and employees cannot contest this position as it was not the lowest classification in the area as described in the agreement.

AWARD: The Employer's preliminary objection as to the arbitrability of the grievances fails. Casual employees with benefits (CWB) are included in the bargaining unit and the hearing on the merits is to proceed as scheduled.

DECISION: 89-034. A

Nova Scotia Liquor Commission AND Nova Scotia Government Employees' Union, Local 470

Chipman, Hallett, and Matthews, JJA (NSSCAD)

Ronald A Pink, for the Union
Eric B Durnford, Maureen E Reid, for the Employer

June 12, 1990

ISSUES: Judicial review - Grounds for - Error of law on face of record 1:5400; Judicial review - Grounds for - Excess of jurisdiction 1:5300; Employee - Defined 5:1122; Employee - Temporary, casual and part-time 5:1124; Bargaining unit - Employees excluded 5:1120, 5:122 - Temporary, casual, or part-time 5:1124.

CIRCUMSTANCES: In two preliminary issues raised during an arbitration hearing, the arbitrator found that he had jurisdiction. The award was appealed by the Employer to the Nova Scotia Supreme Court, Trial Division, which denied the appeal. This decision is now appealed to the Appeal Division on the basis that the arbitrator erred in finding that he had jurisdiction.

AWARD: The appeal is allowed. The arbitrator erred in finding that he had jurisdiction on both preliminary issues. The position which was to be filled was not one contemplated to be included in the relevant provision of the collective agreement; the fact that a lower position is vacant does not mean that it does not exist in the hierarchy. The position in question was not the "lowest" classification. Further, the definition of employee in the collective agreement makes it clear that casual employees with benefits are not entitled to all of its provisions, and are not members of the bargaining unit. Both of these interpretations by the arbitrator are patently unreasonable, and the award should have been quashed by the chambers judge.

AUTHORITIES: Municipal Contracting Ltd. v. International Union of Operating Engineers, Local 721 and Kydd (1989), 91 N.S.R. (2d) 16; 233 A.P.R. 16. Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical & Allied Workers, Local 14 (1989), 102 N.R. 1; 62 D.L.R. (4th) 437. Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2. S.C.R. 227; 26 N.R. 341; 25 N.B.R. (2d) 237; 51 A.P.R. 237; 97 D.L.R. (3d) 417; 79 C.L.L.C. 14209. Arbitration Act, R.S.N.S. 1967, c.12, s. 15(2). Trade Union Act, R.S.N.S. 1989. c.475. ss. 30; 30 (3) (c). Collins, English Dictionary of the English Language (2nd ed.).

DECISION: 89-035

Walker's Regional Ambulance Services Ltd. AND Bakery, Confectionery & Tobacco Workers' International Union, Local 446

MacDougall, R. Lorne - Arbitrator

Rene Quigley, for the Union
Donald Walker, for the Employer

May 3, 1989

ISSUES: Lay-off 6:2200; Seniority - Applications 6:2000; Management rights - Fairness 4:2300 .

CIRCUMSTANCES: The Grievor is a part-time emergency medical assistant who was laid off and told he would not be re-scheduled. The Grievor seeks compensation for the time and pay lost in the final quarter of 1988. The Employer argues it did not re-schedule the Grievor because he was employed full-time and part-time for another employer. The Employer has offered the Grievor a settlement.

AWARD: The Arbitrator found the Grievor had abandoned his claim by not providing records from his other employer as undertaken and agreed. The Grievor shall receive the settlement from the Employer as full compensation of his claim.

DECISION: 89-036

Inverness District School Board AND Canadian Union of Public Employees, Local 955

Outhouse, Bruce - Arbitrator

Alex Sommerville, for the Union
Arthur Pickup, for the Employer

March 15, 1989

ISSUES: Insurance and welfare plans - Entitlement to benefits - Lay-off 6:2352; Lay-off - Entitlement to benefits - Medical benefits 8:3320; Collective agreement - Matters arising outside of 2:1200 ; Past practice 3:4430; Interpretation - Aids to interpretation - Past practice 2:2220; Management rights 4:2300.

CIRCUMSTANCES: The four Grievors are "ten-month employees" who work only when schools are open. The Grievors were absent from work due to illness or injury and receiving sick leave benefits immediately prior to the close of the school year. Each had sick leave credits which they could have used during the summer. However, the Employer discontinued their sick leave benefits as of the date the remaining ten-month employees were laid off. The Grievors claim they are entitled to the payment of sick leave benefits while on lay-off due to past practice of the Employer. They request they be compensated for all benefits wrongfully withheld. The Employer argues the past practice is based upon an erroneous interpretation of the collective agreement and management acted within its rights by refusing to perpetuate the error.

AWARD: The grievance succeeds. Although the Employer's interpretation of the agreement regarding ten-month employees' entitlement to sick-leave benefits is technically correct, the Employer's past practice constitutes a benefit which cannot be removed. The Employer is directed to compensate the Grievors for the sick leave benefits they would have received had the Employer maintained its previous practice with respect to the payment of such benefits.

AUTHORITIES: Re Regional Municipality of Ottawa-Carleton et al and Ottawa-Carleton Public Employees Union (January 27th, 1987), unreported (P.C. Picher). Re Ontario Educational Communications Authority and National Association of Broadcast Employees & Technicians, Local 72 (1976), 11 L.A.C. (2d) 258 (Brent). Re Township of Jaffray & Melick and Canadian Union of Public Employees, Local 191 (1987), 29 L.A.C. (3d) 402 (Wilson). Re Corporation of the City of Ottawa and Canadian Union of Public Employees, Local 503 (June 21st, 1977), unreported (Weatherill). Re Corporation of the City of Ottawa and Ottawa-Carleton Public Employees Union, Local 503 (March 4th, 1983) unreported (Little). Re Herb Fraser and Associates Ltd. and United Steelworkers, Local 7022 (1979), 23 L.A.C. (2d) 311

(O'Shea). Re Corporation of City of Waterloo and Canadian Union of Public Employees, Local 1542 (1979), 25 L.A.C. (2d) 120 (O'Shea). Re Victoria Times Colonist and Victoria Newspaper Guild (1984), 17 L.A.C. (3d) 284 (Hope). Re Johnston Terminals Ltd. and Teamsters Local 31 (May 12th, 1988), unreported (MacIntyre). Re Metropolitan Transit Operating Company and Amalgamated Transit Union, Locals 101-134 and 109 (September 12th, 1980), unreported (Bird). Re Corporation of City of Waterloo and Canadian Union of Public Employees, Local 1542 (1979), supra. Re Herb Fraser and Associates Ltd. and United Steelworkers, Local 7022 (1979), supra.

DECISION: 89-037

Halifax (City) AND Halifax Civic Workers Union, Local 108

Scaravelli, N.M.- Chair; Moreash, Michael; Ross, Joe

Charles MacDougall, for the Union
Gerald Goneau, for the Employer

April 6, 1989

ISSUES: Theft 7:3310; Discipline and discharge - Grounds for - Theft 7:3314; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000, - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor was discharged for theft after being observed stealing rose bushes from City property. Commission of the offence is acknowledged and the Grievor is seeking reinstatement only. The Employer argues there are no mitigating factors in favour of the Grievor and that trustworthiness is an essential element to the employment relationship.

AWARD: The grievance succeeds in part. The Majority determined that discharge is too harsh a penalty in this case, as this was an isolated act and not part of any scheme. The items stolen were of insignificant value and obtained for the Grievor's use and not resale. However, the Board does not intend to diminish the seriousness of the offence and the Employer's concerns regarding the trustworthiness of its employees. The Majority alters the penalty of discharge to a suspension without pay or accumulation of seniority during suspension from the date of discharge to the normal rehiring period in the spring.

DISSENT: Moreash would allow the grievance. The act of theft indicates that, in the absence of any of the usual mitigating circumstances, the Employer can no longer be expected to continue the employment relationship once reasonable trust in the employee has been destroyed.

AUTHORITIES: Brown and Beatty, (2nd ed.) p.386. Scott and Company Limited v. Canadian Food and Allied Workers 1 Can. L.R.B.R., 1.

DECISION: 89-038

H.W. Corkum Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Kydd, William H. - Arbitrator

Gordon Forsyth, for the Union
Peter Corkum, for the Employer

April 17, 1989

ISSUES: Contracting out - 5:1300, 5:0000; Interpretation - Words and phrases - Bargaining unit work 5:1200; Remedies - Authority of award - Retaining jurisdiction 2:1400.

CIRCUMSTANCES: The Union alleges the Employer violated the collective agreement when a sub-contractor employed non-union workers. The Employer signed a contract with the Province to perform specified work, and was authorized to award subcontracts. The Employer argues there has been no breach of the agreement because it was acting as project administrator and not general contractor. The Employer maintains the Province had the sole authority to determine who the subcontractors would be. The only issue at hand is whether the Employer has breached the collective agreement. If so, any damages will be determined in a subsequent decision.

AWARD: The grievance succeeds. The Employer clearly acted as the general contractor as evidenced by several factors; the contract made the Employer responsible for all the work and there was no contract between the Province and the subcontractor; all payments were made by the Province to the Employer who in turn paid the subcontractors; and there is nothing in any of the documentation to imply the Employer was only acting as the agent of the Province.

DECISION: 89-038.A

H.W. Corkum Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Kydd, William H. - Arbitrator

Gordon N. Forsyth, Tom Stone, for the Union
Peter Corkum, for the Employer

May 3, 1989

ISSUES: Remedies - Authority to award - Retaining jurisdiction 2:1400; Bargaining unit - Work assignment 5:1200; Contracting out of 5:1300; Past practice 3:4430.

CIRCUMSTANCES: This is a supplementary award to Decision 89-038 regarding damages for the Employer's breach of the collective agreement for failing to employ union personnel for certain construction duties. The issue to be decided is whether the work in question falls within jurisdiction of the Union. The Union gave evidence that the work performed was always part of the carpenters' traditional work, although not performed exclusively by carpenters. The subcontractor performed 550 hours of this work, although Union members were available to do the work.

AWARD: The grievance succeeds. The fact that the Union does not perform the majority of a specific type of work does not mean that the work falls outside their craft jurisdiction. The work in question was part of the work customarily done by members of this Union and the Employer was therefore obliged to hire union personnel to perform it. The Union is awarded an amount in trust for those members who were unemployed and were entitled to the work at the time in question.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3d ed.) p. 5:1200. Re Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America. Local 246 (1975), 57 D.L.R. (3d) 199. Labours International Union and Brotherhood of Carpenters v. Landing Construction Ltd. et al (1986) 72 N.S.R. (2d) 26.

DECISION: 89-039

Construction Aggregates Ltd. AND International Union of Operating Engineers, Local 721

MacDougall, R. Lorne - Chair; Durnford, Eric B.; MacDonald, Daniel

Gordon Forsyth, for the Union
John D. Plowman, for the Employer

April 30, 1989

ISSUES: Promotion, demotion and transfer - Defined 6:2100; Interpretation - Words and phrases - Promotion 6:2100; Seniority - Applications - Promotion, demotion and transfer 6:2100; Skill and ability 6:3000.

CIRCUMSTANCES: The Grievor suffers from silicosis. His position as Mechanic requires that he work outdoors most of the time, and frequently there is a cloud of dust where he works. The Grievor occasionally relieves the position of Control Operator which is in a dust free environment. The Grievor applied for a Control Operator position when one became available, but was not awarded the position. The Grievor alleges the Employer violated the seniority and skill and ability articles of the collective agreement by not awarding him the position. The Employer argues that this is not a case of promotion as the Grievor would be moving to a lower classification. The Union maintains there are other considerations than rates of pay which should be taken into account when deciding whether this is a promotion for the Grievor.

AWARD: The grievance fails. The Grievor has valid personal reasons for seeking the job in question, but there is nothing to indicate that this would be a promotion for him. The Board expresses sympathy and concern for the Grievor and recommends consideration of his cause in the future.

AUTHORITIES: Re: Ascolectric Ltd. and International Union of Electrical, Radio and Machine Workers, Local 553, (1980), 26 L.A.C. (2d), 390 (Weatherill) at p. 393. Re: Labatt's Ontario Breweries Ltd. and United Brewery Workers, Local 304, (1973) 2 L.A.C. (2d) 40 at pp. 43/44.

DECISION: 89-040

Inverness District School Board AND Canadian Union of Public Employees, Local 955

Outhouse, Bruce - Arbitrator

Alex Sommerville, for the Union
Arthur Pickup, for the Employer

May 10, 1989

ISSUES: Wages - Alteration of wages 8:1400; Working hours and shifts 5:3100; Interpretation - Words and phrases - Work - Hours worked 8:2130; Intention of the parties 4:2100; Collective agreement - Matters arising outside of 2:1200.

CIRCUMSTANCES: This policy grievance involves bus drivers who regularly work split shifts, usually two and one half hours in the moring and/or the afternoon. The issue is related to a change in the manner of determining the work hours of drivers, who are guaranteed a minimum of five hours per day. The Union argues that in terms of credited hours of work, all necessary travel time as well as time spent by the drivers inspecting and cleaning their buses must be taken into account. The Union also contends that drivers who work more than two and one half hours per shift are entitled to extra pay beyond the five hour minimum guarantee. The Employer maintains that a bus driver's work begins when he makes his first pick-up and ends when he makes his last drop-off, both morning and afternoon. The Employer also denies that drivers are entitled to be paid extra for working in excess of two and one half hours in the morning or afternoon.

AWARD: The grievance succeeds in part. The Employer is obliged to take into account all necessary travel time as well as a reasonable allowance for time spent inspecting and cleaning the bus when calculating a driver's hours of work. However, there is no merit to the Union's argument for pay for a minimum of two and one half hours of work in the morning and the afternoon. The agreement specifies only that there is a guarantee for five hours of pay per day.

DECISION: 89-041

Municipal Contracting Ltd. AND International Union of Operating Engineers, Local 721

Clarke - CJAD (NSAD); Hart, Macdonald, Matthews, Chipman - JJA

R.A. Pink and G.N. Forsyth (appellant), for the Union
G.M. Mitchell and T.P. Donovan (respondent), for the Employer

May 17, 1989

ISSUES: Adjournments 3:2300; Time-limits - Restriction on arbitrability 2:1100; Judicial review - Grounds for review - Natural justice 1:5220.

CIRCUMSTANCES: The appeal is of the decision of Davison who granted the application of the respondent (Employer) and issued an order in the nature of certiorari to quash the decision of the arbitrator. In 1987 the Union filed four grievances alleging the Employer was employing non-union employees at some of its jobs, contrary to the hiring provisions of the collective agreement. The Arbitrator was appointed by the Minister of Labour. At the hearing, counsel for the Employer asked that the proceeding be adjourned, arguing that failure to do so would be an abuse of s. 103 of the Trade Union Act and the principles of natural justice, and a violation of the Charter of Rights. Counsel for the Union refused to agree to an adjournment, and after consideration Arbitrator Kydd ruled that the hearing would proceed. The grievances succeeded and the Union was awarded damages. The Employer applied to the Trial Division for an order in the nature of certiorari to quash the award of the arbitrator. Justice Davison concluded there was no violation of the Charter. However, he found that Arbitrator Kydd erred in law and had been unfair in failing to grant an adjournment in the circumstances. Davison granted certiorari and quashed the decision of the Arbitrator. The Union appeals from the decision of Davision on the ground that he erred in law in quashing the decision of Arbitrator Kydd.

AWARD: The appeal is allowed, and the decision and award of Arbitrator Kydd is restored. The appellant (Union) is awarded costs. Arbitrator Kydd committed no error in either the interpretation or the exercise of his jurisdiction in refusing the preliminary motion of the respondent (Employer) for an adjournment, and in doing so, no violation of natural justice occurred.

AUTHORITIES: Blanchard v. Control Data Canada Ltd. et al (1984), 14 D.L.R. (4th) 289 (S.C.C.) p. 307. British Columbia Telephone Company v. Telecommunication Workers Union [1985] 6 W.W.R. 214 p. 228. Zeller's (West.) Ltd. v. Retailers, Etc. Union and Douglas Aircraft Co. of Can. v. McConnell affirmed by the Supreme Court of Canada on appeal December 8, 1988 (1988), 88 N.R. 260). Yorkdale Drywall Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 83, (1987), 79

N.S.R. (2d) 444. Reid and David, Administrative Law and Practice, Second Edition, p. 213 Nicholson v. Haldimand - Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311. Scott et al v. Rent Review Commission (1977), 23 N.S.R. (2d) 504. Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al (1969), 1 D.L.R. (3d) 417 at p. 422 r.v. Quebec Labour Relations Board, Ex. p. Komo Construction Inc. [since reported ante p. 125 [1968] S.C.R. 172]. Municipal Spraying and Contracting Limited v. International Union of Operating Engineers Local 1721 (1977), 21 N.S.R. (2d) 351 (N.S.S.C.A.D) at 358. Interpretation Act, R.S.N.S. (1967), c. 151, s. 8 (3). Smith, Kline and French Laboratories v. Attorney General of Canada (1986), 34 D.L.R. (4th) 584 (F.C.). R.v. Ertel (1987), 58 C.R. (3d) 252 (Ont. C.A.). Andrews v. Law Society of British Columbia, (1989), 91 N.R. 255.

SEE ALSO:87-130

DECISION: 89-042

Brunswick Drywall Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
David Thompson, for the Employer

May 19, 1989

ISSUES: Discipline and discharge - Just cause 7:1200, - Grounds for - Insolent behaviour or obscene language 7:3660, - Evidence - Burden of proof 3:2411; Lay-off - Defined 6:2200.

CIRCUMSTANCES: The Grievor is a drywall worker who was laid off by the Employer. The Grievor was unaware he was being considered for layoff, and was only told of the layoff after the Employer received a complaint from a third party about crude sexual comments by the Grievor. The Union claims the Grievor was not laid off, but dismissed without just cause and requests compensation for lost earnings and benefits plus reinstatement of the Grievor the next time the Employer is hiring drywall workers. The Employer contends the Grievor was laid off in the normal course of events due to two other employees being transferred in from another jobsite. The Employer also maintains that the decision to effect the layoff was taken prior to the sexual insult incident and that the latter served only to advance the timing of the layoff by a few hours.

AWARD: The grievance succeeds. The evidence indicates that the Grievor was dismissed for disciplinary reasons and not laid off for lack of work. The Employer was unable to prove the alleged misconduct and therefore falls short of satisfying the just cause standard. The Employer is directed to compensate the Grievor for lost wages and benefits, plus rehire the Grievor at the earliest opportunity.

DECISION: 89-043

Metropolitan Authority (Metro Transit Division) AND Amalgamated Transit Union, Local 508

Christie, Innis - Arbitrator

Kim H.W. Turner, for the Union
Amery Boyer, J.J. Mombourquette, for the Employer

May 23, 1989

ISSUES: Working hours and shifts 5:3100; Management rights - Overtime 5:3210; Interpretation - Words and phrases - Emergencies and unanticipated happenings - Emergency 5:3100; Past practice 3:4430; Work assignment - Contracting out - Improper assignment within unit 5:2000, Burden of proof 3:2414; Estoppel 2:2220.

CIRCUMSTANCES: The three Grievors are bus drivers who, having completed a regular shift of eight hours on the spareboard (that is, not assigned to a specific route) were compelled by the Employer to do extra work. The Union claims this work can only be assigned in an emergency, not relevant in this case; further, the three Grievors were not chosen appropriately for the task. The Union requests payment of the overtime rate for all hours that the Grievors were compelled and assurance that this will never happen again. The Employer's evidence indicated that there was ample cause for the compelling of extra work in that a high number of regular workers were unavailable. Also, the compelling of spareboard operators is a regular occurrence, and therefore an established practice.

AWARD: The grievance fails. Each of the Grievors was required, in accordance with the Employer's pre-established system, for work without which transit service would have been interrupted, which is sufficient evidence of emergency. Furthermore, the practices adopted by the Employer for determining which employees were to be compelled to do the extra work in question were consistent with management rights and well established practice.

AUTHORITIES: Province of Nova Scotia and N.S.G.E.A. (Cainey) (March 3, 1983 - unreported) at p. 18. Moffats Limited (1970), 21 L.A.C. (2d) 278 (Arthurs), at p. 279.

DECISION: 89-044

Maple Hill Manor AND Canadian Union of Public Employees, Local 2765

MacDonald, David J. - Arbitrator

James Crosby, for the Union
Brian Johnston, for the Employer

June 4, 1989

ISSUES: Collective agreement - Term of operation - Retroactivity 4:1610; Retroactivity - Wage schedules 8:1300; Interpretation - Intention of the parties 4:2100; Negotiating history 3:4420.

CIRCUMSTANCES: The parties signed a new collective agreement in June 1988. The Union contends that all benefits were intended retroactive to April 1987. The Employer argues that only wages and the impact of wages on certain other benefits such as overtime, holidays, vacations and sick leave, are retroactive to April 1987. All other provisions are only effective from the date of signing of the agreement.

AWARD: The grievance fails. The duration clause in this agreement does not contain any retroactive effect, and therefore the provisions other than those pertaining to wages are effective from the date of signing.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3d ed.), s. 3:4420. Trade Union Act, R.S.N.S. 1972, C. 19, ss. 41(1) (b), 15 (8).

DECISION: 89-045

Nova Scotia (Solicitor General) AND Police Assn. of Nova Scotia

Veniot, Milton J. - Chair; North, Gregory I.; MacDougall, Charles

David W. Fisher, for the Union
Marian Tyson, for the Employer

May 1, 1989

ISSUES: Time-Limits - Restriction on arbitrability 2:1100; Wages - Pyramiding 8:2140; Overtime - Defining overtime - Overtime hours worked 8:2130.

CIRCUMSTANCES: This adjudication began by dismissing the Employer's preliminary objections regarding the Union's delay in filing the grievance. The Grievor is a Correctional Officer who works 12-hour shifts. He had arranged to take a regularly scheduled shift off with pay. It was possible for him to do this as he had a sufficient "bank" of paid time off available, a common practice. Although the Employer had agreed to his time off, the Grievor was asked to come in on this day to replace someone who called in sick. The Grievor came in to work and was subsequently paid for 18 hours (time and one half for the 12 hour shift) plus 12 hours representing the day off he had arranged to take (those hours were subtracted from his bank of hours), for a total of 30 hours. The Union claims the Grievor is entitled to another day (12 hours) for a total of 42 hours, to replace the holiday hours in the Grievor's "bank" of hours. The Employer maintains the 30 hour payment for the 12 hour shift is correct.

AWARD: The grievance fails. The day the Grievor worked was not a legal statutory holiday and therefore the Union's claims for pay for an additional 12 hours is invalid.

DISSENT: MacDougall argues that the Grievor should be entitled to the 12 hours banked time, 12 hours for the shift, plus 12 hours at the time and one half rate, for a total of 42 hours. The 12 hours in lieu time was taken from the Grievor's bank of hours to make up the regular day's pay so that he only received 12 hours at time and one half and no regular day's pay; he is therefore entitled to the additional 12 hours.

AUTHORITIES: The Amherst Police Association, Local 104 or the Police Association of Nova Scotia and Town of Amherst (unreported, January 17, 1986, Mr. Outhouse, Chair).

DECISION: 89-046

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union, Local 470E

Sherar, Michael - Arbitrator

Kimberly H.W. Turner, for the Union
Maureen E. Reid, for the Employer

May 30, 1989

ISSUES: Wages - Performance of work outside classification 5:2410, 5:2420; Estoppel 2:2210; Past practice 3:4430.

CIRCUMSTANCES: The Grievor performed duties in a higher classification for 18 work days. The Union argues these were core duties for the higher position and that this was not a training period. The Employee claims a differential increase in pay for the time period. The Employer argues that an employee in the Grievor's position is obligated to do relief work as required, and the Grievor was not temporarily assigned to do the work of another classification. The Employer also maintains that the period in question was a training period leading to a possible promotion which would exempt the Grievor from entitlement to acting pay.

AWARD: The grievance succeeds. The Grievor clearly performed the job functions of a higher classification for longer than the two days specified in the Collective Agreement. This was also clearly not a training period, as argued by the Employer. The Grievor is entitled to acting pay for the 18-day time period in question.

AUTHORITIES: Nova Scotia Government Employees Union V. Civil Service Commission (Outhouse, Jan. 15, 1986). Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Local 300 (1984), 14 L.A.C. (3d) 238. Re Maritime Telegraph and Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983), 12 L.A.C. (3d) 90. Re Ferranti-Packard Ltd. and United Steelworkers, Local 5788, (1972), 1 L.A.C. 216. Nova Scotia Government Employees Union and the Civil Service Commission (Outhouse, Jan. 7, 1987). Nova Scotia Government Employees Union and her Majesty the Queen in the Right of the Province of Nova Scotia (Cromwell, March 27, 1987). Re McKechnie Ambulance Service Inc. and Ontario Public Service Employees Union, Local 347 (1987) 27 L.A.C. (3d) 385. N.S.G.E.U. and the Civil Service Commission (Team Leaders). Re Westinghouse Canada Inc. and U.E.W., Local 549 (Swan, December 30, 1982). Re CN/CP Telecommunications (1981), 4 L.A.C. (3d) 205 at 207-208.

DECISION: 89-047

Otis Canada Inc. AND International Union of Elevator Constructors, Local 125

Demont, Eric G. - Arbitrator

Raymond Larkin, for the Union
Jan Silliker, for the Employer

June 1, 1989

ISSUES: Travel allowance 8:3700; Collective agreement - Ambiguity 3:4400; Evidence - Types of evidence - Extrinsic evidence 3:4400 - Past practice 3:4430; Procedure - Powers of board of arbitration - Preliminary objections 3:2100.

CIRCUMSTANCES: The Grievor is a mechanic's helper who lives in New Brunswick. When seeking work with his Union, the Grievor was told there was work in Halifax for which he was entitled due to his seniority. The Grievor came to Halifax and was hired, but was told that no living expenses would be paid. The Union argues the Grievor is entitled to $350.00 per week from the time he commenced work in Halifax, based on past practice in similar situations. The Employer raised the preliminary objection that the Grievor is from New Brunswick and therefore the Arbitrator has no jurisdiction to hear the case. The Employer also maintains the agreement is clear, stating that no expense allowance be paid to employees working within the Halifax territory, regardless of where the employee is from. Past practice should not be resorted to in this situation.

AWARD: The grievance succeeds. The record of the past practice of the Employer in paying living expenses is evidence of the way both parties interpreted the Collective Agreement. The preliminary objection is not valid because the case involves an employee working in Nova Scotia, regardless of where the Grievor is originally from.

AUTHORITIES: International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.), Local 702, vs. Volvo Canada Limited 18 N.S.R. (2d), 592. Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at p. 3:4430.

DECISION: 89-048

Nova Scotia College of Art and Design (Board of Governors) AND Nova Scotia College of Art and Design Faculty Union

MacLellan J.A. - Chair; Ginsburg, Jack; MacDougall, Donald H.

John D'Orsay, for the Union
Eric Durnford, for the Employer

June 5, 1989

ISSUES: Skill and ability - Burden of proof 3:2413, - Criteria of ability and qualifications 6:3300; Promotion, demotion and transfer - Reasonableness 6:3100; Collective agreement - Matters arising outside of 2:1200.

CIRCUMSTANCES: The Grievor applied for promotion from the rank of Associate Professor to Professor. The Grievor's application was denied because the Employer alleged that the criteria for promotion had not been fulfilled. The Union argues that deficiencies in some areas are offset by strengths in others and requests that the Grievor be promoted to Professor. The Employer maintains that the criteria for promotion to Professor do not provide for counter-balancing any deficiencies. The Grievor simply does not meet all the qualifications and therefore cannot be promoted.

AWARD: The grievance fails. The issue is not the validity of Employer's decision, but whether or not the collective agreement has been breached. The Board found that the Employer had acted reasonably in deciding that the Grievor did not discharge the burden placed upon him to show that he had met the criteria for promotion to Professor.

DECISION: 89-049

Camp Hill Medical Centre AND Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606

Archibald, Bruce P. - Arbitrator

Gordon Forsyth, for the Union
Kenneth C. Fowlie, for the Employer

June 12, 1989

ISSUES: Recall 6:2354; Work assignment - Changes in job function 5:2410; Interpretation - Words and phrases - Jobs and classifications 5:2000 fn 12; Call-In pay - Purpose 8:3410.

CIRCUMSTANCES: The Grievor is a plumber's helper who, along with other maintenance workers, constitute an emergency call-back group available on call on a rotational basis for the Employer after hours. The Grievor also fills in for the Journeyman Plumber when the person in this higher classification is on vacation. The Union asserts that the Grievor is entitled to be paid at the rate of a Journeyman Plumber during call back periods when he is fulfilling the senior duties on his regular shift. The Employer contends that fulfilling one's regular rotational duties cannot be construed as being assigned to perform work in a higher classification just because the senior person is not available during the regular shift.

AWARD: The grievance succeeds in part. The Grievor is performing the work of a Journeyman Plumber when doing any plumbing work while on recall, provided he is assigned to the senior work during the regular shift. The grievance fails for those call-back duties which are not related to plumbing, such as snow removal or electrical work, even if the Grievor is replacing the Journeyman Plumber during the regular shift. The Grievor is entitled to compensation at the rate of the Journeyman Plumber on at least five of the thirty-four call-backs listed on the grievance.

AUTHORITIES: Re International Union of Operating Engineers, Local 968B and Governors of Acadia University (1985), 16 D.L.R. (4th) 722 (N.S.S.C., App. Div.). Re Richardson Terminals Ltd. and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Grain Elevator Division, Lodge

650 (1973), 2 L.A.C. (2d) 370 (Ont.). International Union of Operating Engineers, Local 721 and Construction Aggregates Ltd., unreported, December 22, 1988 [J.A. MacLellan, Arbitrator]. Re Fairview Nursing Home Inc. Ltd. and London and District Service Workers Union, Local 220 (1983), 9 L.A.C. (3d) 342 (Ont.).

DECISION: 89-050

Keddy's Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 1588

Scaravelli, N.M. - Arbitrator

Ronald Pink, for the Union
Donald Keddy, for the Employer

June 11, 1989

ISSUES: Work assignment - Bargaining unit work 5:1200; Interpretation - Words and phrases - Bargaining unit work 5:1200; Evidence - Burden of proof - Work assignment outside classification 3:2414; Statutes - Aid to Interpretation 2:2100.

CIRCUMSTANCES: The Union claims that construction work was performed by non-union members. The Union therefore claims wages at the journeyman rate for three men as determined by the Collective Agreement. The Company's position is that the work was performed by its own employees because the work was general maintenance and not construction work.

AWARD: The grievance succeeds in part. The project as a whole was not routine maintenance and must be considered as construction work. In addition, the Employer called upon a qualified employee from another of its companies to supervise the work instead of requesting the Union to furnish a competent worker. The Employer is ordered to pay the Union the Journeyman's rate for one Employee over the period worked. The grievance fails regarding the remaining two employees. The Employer is entitled to direct its own workers to perform the work without contravening the Collective Agreement with the Construction Management Bureau.

AUTHORITIES: Trade Union Act R.S.N.S., 1972, C.19, s.89(c).

DECISION: 89-051

Pierce Fisheries Ltd. AND United Food and Commercial Workers, Local 1252 (Fisherman's Union)

Cromwell, T.A. - Arbitrator

Susan D. Coen, for the Union
Eric Durnford, for the Employer

June 12, 1989

ISSUES: Rest breaks 8:3700; Interpretation 4:2100; Management rights - Schedules 5:3100; Evidence - Types of evidence - Extrinsic evidence - Negotiating history 3:4420.

CIRCUMSTANCES: This is a policy grievance in which the Union claims the Employer violated the Collective Agreement by requiring a fishing vessel to sail out of Newfoundland in 48 Hours or less without an agreement by the majority of the crew. A regular trip entitles the crew to four nights shore leave, but a stop in Newfoundland requires 48 hours or less for turnaround, according to the agreement. A regular trip was rescheduled and the crew stopped in Newfoundland instead of Cape Breton in order to accommodate the shorter stay. The Employer contends such agreement is needed only for periods of less than 48 hours.

AWARD: The grievance fails. The collective agreement permits the Employer to require 48 hour turnaround when a vessel lands a regular trip at a port in Newfoundland. Agreement of the crew is required only for turnaround in a lesser period. The clause in contention was intended to modify the entitlement to shore leave only in the special circumstances when a regular trip lands in Newfoundland. A preliminary award in this grievance involved a ruling against the admissibilty of negotiating evidence which the Union wanted to put forward to argue the alleged ambiguity in the agreement.

AUTHORITIES: Leitch Gold Mines Ltd. V. Texas Gulf Sulphur, [1969] 1 O.R. 469 at 512, per Gale, C.J.O. Gorsky, Evidence and Procedure in Canadian Labour Arbitration. The King's English (3d, 1931). Weatherill, J.F.W. A Practical Guide to Labour Arbitration Procedure.

DECISION: 89-052

Metropolitan Authority (Metro Transit Division) AND Amalgamated Transit Union, Local 508

Archibald, Bruce P. - Arbitrator

Kimberley H.W. Turner, for the Union
Amery Boyer, for the Employer

June 20, 1989

ISSUES: Discipline and discharge - Grounds for - Absence from work - Failure to notify employer 7:3110; Illness or disability - Effect on employee - Ability to do job 7:3220, Absence from work 7:3110, 7:3112; Disciplinary penalties - Reasonableness 7:4300; Medical opinion - Reasonable explanation of absence 7:3112; Evidence - Exclusionary rules - Hearsay 3:4310.

CIRCUMSTANCES: The Grievor is a bus driver who received a warning letter and a five day suspension after failing to report to work for two shifts on the same day. The Grievor missed the first shift, called in to say she had overslept, and was rescheduled for the second shift. She then missed the second shift and called in to say she had overslept a second time. The Union claims the Grievor missed the shifts for medically related reasons and requests the restoration of all lost wages and benefits and the removal from her personnel file all material relating to the incidents in question.

AWARD: The grievance succeeds. Medical evidence indicates the Grievor suffers from pre-menstrual syndrome (PMS) and therefore her failure to report was grounded in circumstances which form a reasonable excuse. The five day suspension imposed by the Employer was not based on just cause required by the Collective Agreement. The Employer is ordered to compensate the Grievor for the lost wages and benefits of which she was deprived for that period. The disciplinary letter should be removed from the Grievor's file because two paragraphs relate to the Employer's interpretation of the circumstances of this grievance. However, the Employer is entitled to replace the letter with one which confirms its legitimate concerns about the Grievor's overall attendance record.

AUTHORITIES: Re Canada Glazed Papers Ltd. and Printing Specialities (sic) and Paper Products Union, Local 466 (1974), 5 L.A.C. (2d) 355 (Beatty).

DECISION: 89-053

Truro (Town) and (Board of Police Commissioners) AND Police Assn.of Nova Scotia, Local 102

Outhouse, Bruce - Chair; MacDougall, Charlie; Durnford, Eric

David Fisher, for the Union
David Gruchy, for the Employer

June 22, 1989

ISSUES: Vacations - Scheduling vacations 8:3240; Past practice 3:4430; Reasonableness - Vacation scheduling 8:3240; Management rights - Vacation scheduling 8:3240.

CIRCUMSTANCES: The Grievor is a police officer who regularly works shifts. He requested a two-day vacation over a Friday and Saturday evening shift which was refused by the Employer. The Union takes the position that this decision was arbitrary because it lacked any financial or operational justification. For remedy the Union requests that a declaration be issued to the effect that members whose annual vacation entitlement is not evenly divisible by four have the right to take the left over portion of their vacation entitlement on Friday and Saturday nights without being required to take additional statutory holidays or lieu days in conjunction therewith. The Employer has followed the practice of not allowing its officers to take Friday or Saturday nights off as isolated vacation days, statutory holidays or lieu days. If the Friday and Saturday night vacation forms part of a full shift cycle leave, the Employer allows it and bears the associated overtime costs. These nights are the busiest time for the department and replacements must be brought in at overtime rates. There is some flexibility if the reason for the requested leave is compelling in the opinion of the Chief. The Employer argues that its qualified refusal of the Grievor's request was reasonable and consistent with past practice.

AWARD: The grievance fails. The Employer is justified in placing reasonable restrictions on the granting of vacation leave for Friday and Saturday nights. In addition, the specific restriction on Friday and Saturday nights as isolated vacation days is reasonable.

DISSENT: MacDougall argues the Chief did act arbitrarily and discriminatorily while rendering his decision by forcing two extra days vacation on an employee who did not want them.

AUTHORITIES: Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 (1974), 7 L.A.C. (2d) 34 (Dunn). Re Roy and Treasury Board July 10, 1987), unreported (PSSRB File No. 166-2-15724), (Brown). Re

Canadian Keyes Fibre Co. Ltd. and United Paperworkers International Union, Local 576 (1974), 44 D.L.R. (3d) 305 (N.S.S.C., A.D.). Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1 (1976), 12 L.A.C. (2d) 201 (Betcherman). Brown and Beatty, Canadian Labour Arbitration (3rd ed.), para 8:3240.

DECISION: 89-054

Pioneer Coal Ltd. AND United Mine Workers' of America, District 26

MacLellan, J.A. - Arbitrator

Don MacRae, for the Union
John Plowman, for the Employer

June 26, 1989

ISSUES: Working hours and shifts - 5:3100 - Paid breaks 8:3700; Past practice 3:4430.

CIRCUMSTANCES: The Employer posted a work schedule with 12-hour shifts instead of the usual 8-hour shifts. The grievors worked the longer shifts, but were not compensated for a hot meal as required in the collective agreement when employees work two hours or more at the end of a regularly scheduled shift. The Employer argues that the 12-hour shift was a regularly scheduled one and, as a result, they do not have to provide a hot meal or an additional hour's pay. The Union argues the Employer imposed the longer shift without consulting the Union. Therefore, the Grievors were required to work more than two hours at the end of their regularly scheduled shift of eight hours, and are entitled to compensation.

AWARD: The grievances succeed. The Employer unilaterally changed the regular hours of work without consulting the Union. Having so changed the regular hours of work, the Employer violated the collective agreement by not providing a hot meal or an additional hours pay.

DECISION: 89-055

Dartmouth (City) AND Nova Scotia Union of Public Employees

Cotter, Brent W. - Chair; Durnford, Eric; D'Orsay, John

Ronald Stockton, for the Union
Michael H. Moreash, for the Employer

February 6, 1989

ISSUES: Overtime - Distribution of overtime 5:3220, Persons Normally Performing 5:3222, - Scheduling 5:3200; Evidence - Burden of Proof - Applications - Overtime Distribution 3:2417.

CIRCUMSTANCES: The Grievor is a "gas man" who dispenses propane fuel for the Employer's fleet vehicles. He alleges he should have been called in to perform overtime work on two separate occasions when the fleet was operating and the drivers were fuelling vehicles themselves. The Grievor requests compensation for the hours he should have been called in to work. The Employer maintains that because the fleet drivers occasionally fuel their own vehicles, even when the Grievor is on duty, there was no requirement to call the Grievor in for these two occasions.

AWARD: The grievance succeeds in part. The Majority found that the work regularly performed by the Grievor was performed by employees who do not regularly perform this work, and this was done in sufficient quantity to violate the collective agreement on one occasion as grieved. There is insufficient evidence for the second occasion and that part of the grievance is denied.

DISSENT: Durnford dismisses both grievances. The Grievor did not establish a claim for either grieved event because he did not prove he has exclusive right to perform the work in question, and the proof of the claim as to what work was actually done was inconclusive.

AUTHORITIES: Re Munroe Acme Ltd. (1971), 23 L.A.C. 177 (Curtis). Re Thompson Products Employees' Association and Thompson Products Ltd. (1970), 22 L.A.C. 45 (Brown).

DECISION: 89-056

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, Brent W. - Arbitrator

Ronald Pink, for the Union
William Wilson, for the Employer

April 12, 1989

ISSUES: Time-limits - Restriction on arbitrability 2:1100; Grievance - Continuing grievance 2:3128, - Abandonment 2:3230; Policy grievance - Nature of 2:3124; Overtime 5:3200, - Defining overtime - Daily overtime 8:2100; Statutory holidays - Work on day of holiday 8:3130.

CIRCUMSTANCES: The Grievors are elevator inspectors who are claiming overtime compensation for work performed on days the Grievors claimed were paid holidays. At the hearing the Grievors amended their claim for relief by abandoning their request for retroactive overtime pay, seeking only a declaration regarding the entitlement to overtime pay. The Employer argues the Arbitrator has no jurisdiction to hear and decide this matter because the grievance had been submitted beyond the time-limit, and that change in the Union's position to seek a declaration constituted an amendment of the grievance.

AWARD: The grievance is dismissed because it was filed out of time. The adjudication first dealt with the preliminary objections, especially the issue of time-limits. Each of the alleged violations of the collective agreement was a discrete event, not a continuing one, and it therefore cannot be argued that this is a continuing grievance. The grievance was therefore filed outside the time-limits imposed by the collective agreement and the Adjudicator does not have the jurisdiction to decide it.

AUTHORITIES: Re Nova Scotia Government Employees Union and Civil Service Commission (unreported, April 23, 1987, Sherar). Brown and Beatty, Canadian Labour Arbitration, 3rd ed. (1988) pp. 2 - 51 -2. Re U.A.W., Local 252, and Canadian Trailmobile Ltd. (1968), 19 L.A.C. 227 (Adell). Gorsky, Evidence and Procedure in Canadian Labour Arbitration (1981), p. 34, 47. Re Temiskaming Hospital and Ontario Nurses' Union (1987), 28 L.A.C. (3d) 178 (Devlin). Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 (1984), 13 L.A.C. (3d) 356 (Picher). Re International Chemical Workers Union, Local 197 and Merck and Company Limited (Montreal) (March 4, 1953, Scott).

DECISION: 89-057

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Darby, Peter - Arbitrator

Kimberley Turner, for the Union
Jonathan Davies, for the Employer

June 26, 1989

ISSUES: Reinstatement 2:1470; Disciplinary penalties - Mitigating factors - Personal or emotional problems 7:3430; Discipline and discharge - Grounds for - Insolent behaviour or obscene lanaguage 7:3660, - Alcoholism 7:3200, 7:3210, 7:3220.

CIRCUMSTANCES: The Grievor had been dismissed from his position for acting abusively towards the public. This behaviour resulted from the Grievor's addiction to alcohol; previous incidents of unsatisfactory behaviour resulted from the same cause. The Grievor told the Employer that he has enrolled in a program of rehabilitation and will make every effort to make it successful.

AWARD: This consent award adopts the following action: the discharge of the Grievor is set aside and he shall be reinstated to his previous position with a suspension without pay in the intervening period. The reinstatement is conditional upon the Grievor complying with the terms of the recovery contract of his alcohol rehabilitation programme. In addition, the Grievor shall refrain from the use of alcohol or abuse of drugs in any form. If, within two years the Grievor is guilty of work related misconduct or breach of duty caused by the consumption of alcohol or drugs, his employment will be terminated.

DECISION: 89-058

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Jonathan Davies, for the Employer

May 31, 1989

ISSUES: Evidence - Burden of proof - Applications - Discipline 3:2411, 7:2300; Disciplinary penalties - Nature of disciplinary sanction 7:4210; Discipline and discharge - Just cause 7:1200.

CIRCUMSTANCES: The Grievor is a counsellor for handicapped children. He was questioned by his supervisor concerning allegations he had struck two students. The Grievor categorically denied the allegations, which seemed to satisfy the supervisor. The Grievor then received a letter from his supervisor asking for ongoing meetings to discuss the Grievor's job performance in terms of his reaction to student behaviour. The Union argues that this letter is disciplinary in nature and implies wrongdoing on the part of the Grievor. They argue the Employer is disciplining the Grievor without just and sufficient cause. The Employer denies the letter is disciplinary, arguing it is about performance, and does not suggest disciplinable misconduct on the Grievor's part.

AWARD: The grievance succeeds. The Employer was acting with disciplinary intent in responding to what it perceived to be culpable or corrigible conduct on the Grievor's part. The letter is therefore disciplinary in nature, and must be removed from any and all files which it maintains with respect to the Grievor.

AUTHORITIES: Nova Scotia Government Employees Union and Civil Service Commission (March 3, 1987), unreported (Sherar). Re Nova Scotia Government Employees Union and Nova Scotia Civil Service Commission and Michael B. Sherar (1987 S.H. No. 60510), unreported (Nathanson J.). Re Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax and Amalgamated Transit Union, Local 508 (1985), 20 L.A.C. (3d) 203 (Darby). Re Government of Nova Scotia and Nova Scotia Government Employees Union (1985), 23 L.A.C. (3d) 58 (Venoit). Re City of Toronto and Canadian Union of Public Employees, Local 79 (1984), 16 L.A.C. (3d) 384 (Picher). Re Canada Post Corporation and Canadian Postmasters and Assistants Association (1984), 16 L.A.C. (3d) 38 (Saltman). Re Pacific Press Ltd. and Vancouver-New Westminister Newspaper Guild, Local 115 (1986), 23 L.A.C. (3d) 251 (McColl). Re L'Hopital de Montreal Pour Enfants and Infirmieres et Infirmiers Unis Inc. (1981), 29 L.A.C. (2d) 381 (Frumkin). Re

Metropolitan Authority of Halifax, Dartmouth and Halifax County and Correction Officers Association of Nova Scotia (1983), 10 L.A.C. (3d) 265 (Outhouse). Re Canada Post Corporation and Canada Postmasters and Assistants Association, supra. Re Metropolitan Transit Commission of Halifax, Dartmouth and The Municipality of the County of Halifax and Amalgamated Transit Union, Local 508, supra. Brown and Beatty, Canadian Labour Arbitration (3rd ed.), at p. 7-137, 7-138.

DECISION: 89-059

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Kim Turner, for the Union
Bill Wilson, for the Employer

June 14, 1989

ISSUES: Leave of absence 7:3120, - Management rights 7:3120; Illness or disability - Effect on employee - Absence from work 7:3112; Evidence - Types of evidence - Extrinsic evidence 3:4400, - Estoppel 2:2220; Interpretation 4:2300.

CIRCUMSTANCES: The Grievor requested family illness leave on two occasions to take her child to dental appointments. The leave was denied and the Grievor used vacation leave instead. The Union requests that these days be treated as leave for family illness and that the vacation credit used by the Grievor be reinstated to her. The Employer argues that the conditions for family illness leave were not met in this situation, since the child was not acutally ill but only submitting to voluntary preventive dental care.

AWARD: The grievance succeeds in part. In the first occasion, the daughter was attending a routine dental appointment and was clearly not ill. It was simply convenient for the Grievor to take her to her appointment, and therefore not governed by the family illness leave clause. In the second instance, the daughter was having wisdom teeth removed. The Grievor took her for the surgery and then spent the afternoon looking after her. Again, taking her child to the appointment was a matter of convenience and not required; the morning is not covered by family illness leave. However, the Grievor spent the afternoon looking after her daughter after the surgery, and this is clearly a family illness. The Employer is directed to grant the Grievor family illness leave for that afternoon and reinstate the vacation credit of one half day she was required to use on that occasion.

AUTHORITIES: Leitch Gold Mines Ltd. V. Texas Gulf Sulpher Co. [1969] 1 O.R. 469 (Ont. H.C.). Re Boards of Education and the Government of Saskatchewan and the Teachers of Saskatchewan (1983), 12 L.A.C. (3d) 309 (Smith). Re General Bakeries Ltd. and Milk and Bread Drivers Union, Local 647 (1981), 3 L.A.C. (3d) 444 (Rayner). Re Barber-Ellis of Canada Ltd. and United Automobile Workers, Local 397 (1975), 9 L.A.C. (2d) 79 (Brown). Re International Chemical Workers, Local 798, and Union Gas Co. of Canada Ltd. (1970), 22 L.A.C. 148 (Hanrahan). Re Domglas Ltd. and United Glass and Ceramic Workers, Local 203 (1980), 26 L.A.C. (2d) 94 (Burkett). Re Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Local 647 (1985), 18 L.A.C. (3d) 257 (Schiff).

DECISION: 89-060

H.W.Corkum Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Demont, Eric G. - Arbitrator

Gordon N. Forsyth, for the Union
Peter Corkum, for the Employer

July 19, 1989

ISSUES: Union - Activity and business 9:1400 - On company time 9:1400; Management rights - Union business on company time 9:1400; Interpretaion - Intention of the parties 4:2100.

CIRCUMSTANCES: This construction arbitration deals with the Employer denying the Union's Business Representative access to the job site, except when workers were on break periods. The Union argues that these restrictions are notification requirements, contrary to the collective agreement, and that they amount to a denial of access to the workers. The Employer maintains that it is in control of all job sites and the Union is required to notify the Employer's representative when the Union's Business Representative wants to visit a site.

AWARD: The grievance succeeds. The collective agreement clearly gives the Business Representative access to the jobsite during working hours, requiring only that the Employer be notified once the Representative is present. The Employer does not have the right to limit the Union Representative's right to talk to Union members as long as the visits to the jobsite do not interfere with the progress of the work.

DECISION: 89-061

The Company AND The Union

MacLellan, J.A. - Arbitrator

Larry Wark, for the Union
Harold Smith, for the Employer

July 17, 1989

ISSUES: Discipline and discharge - Grounds for - Carelessness 7:3520; Disciplinary penalties - Types of penalty - Demotion or transfer 7:3520, 7:3544, - Mitigating factors 7:4400 - Employment record 7:4428.

CIRCUMSTANCES: The grievor was mate on one of the Employer's fishing vessels. He failed to follow a standing order regarding use of electronic navigation aids as an aid to navigation only, and did not perform watch change checks listed in standing orders. The grievor and the captain had discussed the course, and the mate relied on information supplied by the captain. The vessel grounded and was lost; one life was also lost. The grievor was demoted from his position as mate, and was told that he would not in the foreseeable future be considered for any command position. The grievor seeks to be re-instated as mate.

AWARD: The grievance succeeds. In view of the grievor's exemplary work record, and additional information about the incident presented at the hearing, a permanent demotion is too harsh a penalty. As this incident occurred ten months ago, this is considered a sufficient period of demotion, and supports the seriousness with which the Employer regards adherence to standing orders.

DECISION: 89-062

Maritime Beverages Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

Evans, Lawrence K. - Chair; Sommerville, Alex; McDougall, Donald H.

Roseanne M. Skoke, for the Union
Eric Durnford, Maureen Reid, for the Employer

July 14, 1989

ISSUES: Arbitrability - Agreement as primary source of jurisdiction 2:1100, 2:1200; Statutes - Applied by boards of arbitration 2:2100; Job posting - Criteria 6:3300, - Education 6:3320.

CIRCUMSTANCES: The Grievor unsuccesfully applied for a job posting. The position was awarded to someone who was qualified as a licensed refrigeration tradesman, and the Grievor does not have that qualification. The Union argues that the qualifications asked for by the Employer were not required. The Employer's position is that the job in question requires refrigeration repairs to be carried out and there is a statutory obligation to employ a licensed refrigeration tradesman.

AWARD: The grievance fails. The Employer has the right to decide that it required a refrigeration tradesman for the position, and that it has a statutory duty to hire someone with those qualification.

AUTHORITIES: Apprenticeship and Trades Qualifications Act, S.N.S. 1988 C. 4. Refrigeration and Air Conditioning Trade, N.S. Regulation 33/80. Trade Union Act, S.N.S., 1972, C. 19 S. 41 (1) (e). McLeod V. Egan et al (1974), 46 D.L.R. (3rd) 150 at p. 152.

DECISION: 89-063

Digby District School Board AND Canadian Union of Public Employees, Local 1185

Kydd, William H. - Chair; MacDougall, Donald H.; D'Entremont, Catherine

Laurie Hutchins, for the Union
Eric Durnford, for the Employer

July 18, 1989

ISSUES: Discipline and discharge - Just cause 7:1200; Disciplinary penalties - Reasonableness - 7:4300 .

CIRCUMSTANCES: The Grievor is a school bus driver who was suspended without pay as a result of striking a student passenger on the hand. The Grievor was also assigned to a different school bus route, which he claims causes him unreasonable hardship. The issue is whether the Grievor was unjustly disciplined and whether the discipline imposed was excessive. The Employer maintains a "hands-off" policy, applicable to all teachers and staff whereby physical force is not to be used on any students except as a restraint to prevent harm to any student.

AWARD: The grievance fails. The discipline was imposed for a second offence and the Board feels that the suspension without pay, the probationary period, and assignment of the new bus run should be confirmed. The circumstances indicate that the blow to the student's hand was intended to punish and not merely to get the student's attention, as the Grievor claimed. This is a deliberate violation of the Employer's policy for which discipline was justified and required.

AUTHORITIES: Re: Toronto Transit Commission and Amalgamation Transit Union, Local 113 (1980), 28 L.A.C. 184.

DECISION: 89-064

Cove Guest Home AND Canadian Brotherhood of Railway, Transport and General Workers, Local 620

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
Warren P. MacDonald, for the Employer

July 19, 1989

ISSUES: Employee - Defined 5:1122; Insurance and welfare plans - Calculation of benefits 8:3300; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievor is a casual permanent part-time cook who works on a rotational card system. She was called in to work twice in one day, but was unable to report because of illness. Her application for sick leave was denied by the Employer, who argued she was not an employee as defined by the collective agreement. The Union argues the Grievor is an employee and is entitled to be compensated for lost wages for the sick leave.

AWARD: The grievance succeeds. The agreement clearly states that there are three types of employees covered by the agreement - permanent, part-time and probationary employees. The Grievor has been working for the Employer for two years and has union dues deducted from her wages. The Board is of the opinion that casual employees are permanent part-time employees as contemplated by the agreement. The Grievor, therefore, is entitled to sick leave.

DECISION: 89-065

Valley Health Services Assn. AND Nova Scotia Government Employees Union, Local 52

Archibald, Bruce P. - Arbitrator

Kimberley Turner, for the Union
Kenneth C. Fowlie, for the Employer

July 25, 1989

ISSUES: Insurance and welfare plans - Calculation of benefits 8:3330, - Entitlement to benefits 8:3320; Vacation - Computation of vacation and vacation pay - Sick 8:3330;

Illness or disability - Effect on employee - Ability to do job 7:3220; Interpretation - Context 4:2100; Management rights 5:0000.

CIRCUMSTANCES: The Grievor, a general kitchen worker is often required to lift heavy trays as part of her duties. The Grievor began to experience pain in her arm and received ongoing medical treatment which included several periods of sick leave. One of these leaves coincided with the Grievor's scheduled two week vacation. The Employer considered her time off as vacation, not sick leave. The Union alleges that the Employer contravened the collective agreement by denying the Grievor sick leave credit. The Union seeks to have the eighty hours of time off deducted from the Grievor's sick leave credits, and to allow her equivalent vacation at a mutually acceptable time. The Employer argues it adjusted the Grievor's job function so she could continue with lighter duties without missing any work. Also, the collective agreement states that sick leave shall be substituted for vacation leave only if an employee is hospitalized while on vacation, which is not the case here.

AWARD: The grievance fails. The Grievor was able to perform duties required of her. Therefore, the Grievor did not have a right to sick leave with pay under the collective agreement. In addition, the Grievor did not meet the agreement's criterion of hospitalization while on vacation leave in order to qualify for sick leave.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (3rd ed.) p. 4-25

DECISION: 89-066

Halifax (City) AND Canadian Union of Public Employees, Local 143
(Halifax Civic Employees)

Darby, Peter E. - Arbitrator

Kimberley H.W. Turner, for the Union
Barry S. Allen, for the Employer

July 27, 1989

ISSUES: Promotion, demotion and transfer - Reasonableness 6:3100; Skill and ability - Arbitral review 6:3100 - Senior employee if relatively equal 6:3220; Evidence - Types of evidence - Medical records 8:3342; Interpretation - Dictionaries 4:2210.

CIRCUMSTANCES: The Grievor applied for a temporary foreman position, but the position was awarded to a less senior employee. The Grievor was denied the position on the basis of a medical assessment which stated he was unfit for working a night shift, required by the new position. The Grievor had been working a night shift in his previous position, but had been reassigned as a clerk because of medical problems stemming from the shift work.

AWARD: The grievance succeeds. The Grievor would have been awarded the position except for the Employer's concern about his health while acting as a foreman. However, the Employer failed to satisfy itself that the Grievor's ability to cope was still impaired - the decision was based on outdated medical records. The Grievor is to be compensated for the difference between what he earned in his clerk's position and what he would have received as a temporary foreman.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3d ed., 1988) p. 6-35 et seq. Canadian Food and Allied Workers, Local 175 v. Great Atlantic and Pacific Co. of Canada Ltd. et al. (1976), 76 CLLC 14, 056 at pp. 334-5 (Ont. Div. Ct.), leave to appeal to C.A. refused 13 L.A.C. (2d) 211 n. The New Lexicon Webster's Dictionary of the English Language, (1988 Lexicon Publications) at p. 219. Re University Hospital and London and District Service Workers Union, Local 220 (1980) 25 L.A.C. (2d) 134 (Brandt). Brown and Beatty, Canadian Labour Arbitration (3d ed.) p. 6-62. Re Seagram Distillers Ltd. and Distillery, Wine and Allied Workers International Union, Locals 48, 64, 190, 191, and 200 (1983), 11 L.A.C. (3d) 166 (Picher) at pp. 180-1.

DECISION: 89-067

Metropolitan Authority AND Amalgamated Transit Union, Local 508

Cotter, Brent W.- Arbitrator

Kimberley H.W. Turner, for the Union
Amery Boyer, for the Employer

July 30, 1989

ISSUES: Disciplinary penalties - Reasonableness 7:4300, Arbitral review - Substitution of penalty 7:4000, - Progressive discipline 7:4422.

CIRCUMSTANCES: The Grievor was suspended for three days without pay as a result of an accident at the Employer's bus garage in which a bus was damaged. On one of the three days the Grievor attended driver retraining at the Employer's request. The Grievor cleans buses in the garage, driving them around the garage compound when necessary. The Grievor lost control of a bus which then crashed through an exit door and stopped against a snow bank in the compound. An accident committee came to no specific conclusion as to the cause of the accident, but determined the accident was preventable because the Grievor should have been able to stop the bus. The Union recommends that the Grievor be paid for all wages and benefits lost to him, including overtime for all work performed outside of his regular working hours and the removal of all related material from his personnel file.

AWARD: The grievance succeeds. Although the accident occurred through the negligence of the Grievor, the discipline imposed by the Employer was inconsistent with its normal practice, and is therefore inappropriate. The Employer's three day suspension of the Grievor is to be replaced by a one-day suspension, and the Grievor is to be compensated for the two days for which he was inappropriately suspended.

AUTHORITIES: Re the Queen in Right of Nova Scotia and the Nova Scotia Government Employees' Association (1983), 10 L.A.C. (3d) 47 (Darby). Smithrite Disposal Ltd. (1979), 19 L.A.C. (2d) 87.

DECISION: 89-068

Bedford (Town) AND International Assn. of Fire Fighters, Local 2715

Archibald, Bruce P.- Chair; Jessop, John; Nolan, Chris

James Fennel, for the Union
Peter A. McInroy, for the Employer

July 31, 1989

ISSUES: Interpretation 4:2100 - Intention of the parties 4:2100; Past practice 3:4430; Collective agreement - Term of operation 4:1620; Management rights 5:0000.

CIRCUMSTANCES: The Grievor is a fire prevention officer who took courses for which he thought he was entitled to be reimbursed by the Employer for tuition and time spent in class. The Union contends that the Grievor's courses are training seminars or other job skill upgrading as specified in the collective agreement, and are therefore subject to reimbursement. The Employer argues that the Grievor's courses were not covered by the agreement either in content or time period.

AWARD: The grievance succeeds. The Board found that the courses in question do function as job skill upgrading. Although the Employer has the authority to determine which courses can be taken by employees, the Employer failed to object to the Grievor's courses in a timely manner, and cannot retroactively withdraw approval to avoid reimbursement. The Board orders the Employer to compensate the Grievor for the time spent in study by payment of money or time off, at its discretion.

AUTHORITIES: Pocket Oxford Dictionary. Re Penticton and District Retirement Service and Hospital Employees Union, Local 180 (1977), 16 L.A.C. (2d) 97 (B.C. Labour Rel. Bd., Weiler, Chairman) p. 102.

DECISION: 89-069

Chardan Enterprises Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 1588

MacDonald, David J. - Arbitrator

Charlie MacIntyre, for the Union
Ron Pink, for the Employer

July 30, 1989

ISSUES: Union - Recognition 9:1100, - Security - Check off 9:1200; Past practice 3:4430; Evidence - Burden of proof 3:2400; Remedies - Authority to award 2:1400.

CIRCUMSTANCES: The business manager of the Union visited the Employer's job site and found two employees who had not been referred by the Union. A third employee's status was also in question. The Union grieves non-compliance with the collective agreement and seeks full compensation for all hours worked by the employees not hired through the Local office. The Employer was unaware the two employees had not been hired through the Union office and let them go at the end of that work day. The third employee is a regular employee who was assigned to the worksite in accordance with the Employer's transfer rights.

AWARD: The grievance succeeds for the two employees. The third employee's status under the transfer clause is confirmed. The Arbitrator denies he has the authority to award compensation in the manner requested by the Union. Furthermore, it is not appropriate to award damages in this situation because the Employer has always hired Union members, and there is no evidence the Employer deliberately intended to evade his obligations under the collective agreement. When informed of his transgression, the Employer laid off the employees (who were Union members) in question. The Employer is hereby directed to abide by the terms of the collective agreement and henceforth comply with the hiring requirements as stipulated.

AUTHORITIES: Re Polymer Corporation and CIL Chemical and Atomic Workers Internation Union, Local 16-14 (1962) 33 D.L.R. (2d) 124.

DECISION: 89-070

Sydney Community Health Centre AND Nova Scotia Nurses' Union

O'Connell, Charles - Chair, MacDougall, Donald H.; Pink, Ronald A.

John Merrick, for the Union
Eric Durnford, for the Employer

July 31, 1989

ISSUES: Interpretation - Intention of the parties 4:2100; Insurance and welfare plans - Calculation of benefits 8:3300; Vacation - Computation of vacation and vacation pay 8:3230; Statutory holidays - Holiday pay and other benefits 8:3140.

CIRCUMSTANCES: This policy grievance alleges that a policy change made by the Employer as it relates to payment of benefits while employees are collecting Workers' Compensation is contrary to the collective agreement. There is a discrepancy in the agreement that allows nurses working 8-hour shifts to accumulate paid sick leave while they are receiving Workers' Compensation; nurses on 12-hour shifts cannot accumulate or be paid sick leave while on Compensation. The Union also argues that the term "compensation", when used in calculating vacation and holiday entitlement, includes wages and Workers' Compensation benefits. The Union requests the Board to order the Employer to withdraw the new policy. Also, any nurse who has been disadvantaged because of the new policy is to be compensated for any losses in sick leave, vacation and holidays.

AWARD: The Board found no basis for the finding of mutual mistake. The grievance with respect to paid sick leave for 8-hour shift nurses succeeds. The Grievance over paid sick leave for 12-hour shift nurses fails. The grievances over vacation and holidays for both 8-hour shift and 12-hour shift nurses fail. The Board rejects the Union's submission that the term "compensation" includes both wages and Workers' Compensation benefits.

DISSENT: McDougall would dismiss the grievance of the Union with respect to paid sick leave as it applies to 8-hour shift nurses. 8-hour shift and 12-hour shift nurses should accumulate sick leave in the same fashion. It is also important to note that the article in the agreement dealing with Workers' Compensation applies to both types of nurses. Pink believes the parties intended to allow a 12-hour shift nurse to receive sick leave while on Workers' Compensation. The majority is incorrect with a conclusion that an 8-hour nurse is not entitled to receive vacation and holiday credits while on sick leave.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3rd ed.) at p. 4-23. Metropolitan Toronto Police Association et al v. Metropolitan Toronto Board of

Commissioners of Police (1974). Re Alcan Canada Products Ltd. and Metal Foil Workers' Union, Local 1663 5 L.A.C. (3d) at p. 15.

DECISION: 89-071

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Archibald, Bruce P. - Arbitrator

Blaise MacDonald, for the Union
Marion Tyson, for the Employer

August 11, 1989

ISSUES: Skill and ability - Criteria of ability and qualifications 6:3300 - Requirements of the job 6:3100; Lay-Off - Seniority - Applied 6:2200; Seniority - Applications - Bumping 6:2330.

CIRCUMSTANCES: The Grievor is a survey crew employee with the most seniority in his work group. He asked for one of three office positions when he was notified he would be laid off from his seasonal field position. He was denied all of these positions which were filled by employees with less seniority. The Grievor claims reinstatement and reimbursement for lost wages, benefits, and seniority. The Employer argues the Grievor was not given any of the positions because he was not qualified for them.

AWARD: The grievance fails. The Grievor did not have the right to bump the incumbents in the contested jobs because he does not have the qualifications to perform the job requirements. In addition, the Grievor has consistently refused office jobs in the past because of his preference for field work, and has therefore not acquired any experience in this area. It is recommended the Grievor accept an office position early enough in an upcoming season to acquire the requisite qualifications to allow him to keep the office job until the end of the season.

AUTHORITIES: Re U.A.W. and Westeel Products Ltd. (1960), 11 L.A.C. 199. Nova Scotia Department of Transportation and Communications v. The Canadian Union of Public Employees, Local 1867] May 17, 1983, (unreported), Outhouse, Arbitrator. Brown and Beatty, Canadian Labour Arbitration (3rd ed.) p. 6-32. Re Reynolds Aluminum Company of Canada Ltd. and International Moulders and Allied Workers Union, Local 28 (1974), 5 L.A.C. (2d) 251 (Schiff). Re Textile Workers Union and Lady Galt Towels Ltd. (1969), 20 L.A.C. 382 (Christie, Chair). Re United Breweries, Local 173 and Carling Breweries Ltd. (1968), 19 L.A.C. 110 (Christie). Re Tung-Sol of

Canada Limited (1964, 15 L.A.C. 161 (Reville). Re United Electrical Workers, Local 523 and Union Carbide Canada Ltd. (1967), 18 L.A.C. 109 at p. 118.

DECISION: 89-072

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ray Larkin, for the Union
Bill Wilson, for the Employer

August 10, 1989

ISSUES: Religious beliefs - Paid leave 7:3120; Statutory holidays 8:3100; Reasonableness - Leave of absence 7:3120.

CIRCUMSTANCES: The Grievor is a practicing member of the Jewish faith, and during his 10 years with the Employer, had always refrained from working on Jewish High Holidays. Up until 1988, the Grievor arranged annual leave or lieu days in order to observe High Holidays without suffering any loss of pay. In 1988 the Grievor made the conscious decision to request High Holidays as special leave with pay, based on the fact Christian Holidays are recognized in the collective agreement as paid holidays, and he believed Jewish holidays should be accorded the same treatment. The Employer denied his request. The Union claims the Employer discriminated against the Grievor contrary to the collective agreement and the Human Rights Act. The Union requests that the Grievor be granted special leave with pay for the day in dispute.

AWARD: The grievance fails. The collective agreement (and the Employer's adherence to it) does not discriminate against non-Christians merely because it recognizes certain Christian holidays as paid holidays. The Employer has also met the duty of reasonable accommodation by granting the Grievor's request for leave or lieu time on High Holidays, and also giving him the option of special leave without pay.

AUTHORITIES: Human Rights Act, S.N.S., 1969, C. 11, as amended. Andrews v. Law Society of British Columbia, [1989] S.C.J. No. 6. Action Travail des Femmes v. Canadian National Railway Company et al (1987), 76 N.R. 161 (S.C.C.). Ontario Human Rights Commission and O'Malley v. Simpsons-Sears (1985), 64 N.R. 161 (S.C.C.). Mehta v. MacKinnon, Jeqanathan, Sterling and Human Rights Commission (N.S.) (1985), 67 N.S.R. (2d) 429 (N.S.S.C., A.D.). Re Canada Valve Ltd. and International Molders and Allied Workers' Union, Local 279 (1975), 9 L.A.C. (2d) 414 (Shime). Re Toronto Public Library Board and Canadian Union of Public Employees, Local 1996 (1984), 17 L.A.C. (3d) 22 (Kates). Re Humber College and Ontario Public Service Employees Union (1987), 31 L.A.C. (3d) 266 (Swan). McLeod et al v. Egan et al (1974), 46 D.L.R. (3d) 150 (S.C.C.). Insurance Corporation of British Columbia v. Heerspink and Director, Human Rights Code (1982), 43 N.R. 168 (S.C.C.). Re Winnipeg School Division No.1 and Craton et al (1985), 21 D.L.R. (4th) 1 (S.C.C.). Labour Standards Code, S.N.S., 1972, c. 10, as amended. Ontario Human Rights Commission et al v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.). Regina v. Big M Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 (S.C.C.). Edwards Books and Art Ltd. et al v. the Queen (1986), 35 D.L.R. (4th) 1 (S.C.C.). Mills v. The Queen (1986), 29 D.L.R. (4th) 161 (S.C.C.). Re United Nurses of Alberta, Local 115 and Foothills Provincial General Hospital Board (1987), 40 D.L.R. (4th) 163 (Alta.Q.B.). Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd. et al, [1987] 1 W.W.R. 577 (S.C.C.). Re Hanson and Treasury Board (Solicitor-General Canada) (1981), 1 L.A.C. (3d) 97 (Pyle). Re Drummond and Treasury Board (Transport Canada) (1979), 21 L.A.C. (2d) 181 (MacLean).

DECISION: 89-073

Maritime Telegraph and Telephone Co. Ltd. AND Telephone Employees Union

Archibald, Bruce P. - Arbitrator

Ronald A. Pink, David Roberts, for the Union
Gregory I. North, Jan McK. Silliker, for the Employer

August 10, 1989

ISSUES: Contracting out 5:1300; Work assignment - Contracting out - Employees outside unit 5:1400; Interpretation - Words and phrases - Bargaining unit work 5:1200, - Context 4:2100, - Intention of the parties 4:2100; Management rights 5:0000; Past practice 3:4430.

CIRCUMSTANCES: This Union grievance alleges the Employer is using an outside agent to do work normally performed by bargaining unit members.

AWARD: The grievance fails. The Employer has subcontracted bargaining unit work, but such subcontracting is not contrary to the collective agreement. In addition, the Employer has subcontracted in good faith and for genuine business reasons.

AUTHORITIES: Re Drug City-Orangeville (Kent Drugs Ltd.) and Retail, Wholesale and Department Store Unit, Local 414 (1984), 15 L.A.C. (3d) 368. Re Canada Post Corp. and Canadian Union of Postal Workers (Halifax Franchise Grievance) (1988), 34 L.A.C. (3d) 28. Re United Steelworkers of America and Russelsteel Ltd., (1966), 17 L.A.C. 253 (Arthurs) at p. 259. Brown and Beatty, Canadian Labour Arbitration, (3rd ed.) Canada Law Book, 1988, at p. 5-11. Re Robin Hood Multifoods Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers, Local 351 (1980), 26 L.A.C. (2d) 372 (Ladner). Re Nabob Foods Ltd. and Canadian Allied Manufacturers Wholesale and Retail Union, Local 1600 (1982), 5 L.A.C. (3d) 256 (Munroe). Re Citipark, Division of Citcom Inc. and Construction General Workers Union, Local 60 (1988), 33 L.A.C. (3d) 137 (Herbert). Re Country Place Nursing Home Limited and Canadian Union of Public Employees, Local 1854 (1981), 1 L.A.C. (3d) 341 at p. 352. Re Air Canada and Canadian Air Line Employees' Assoc. (1975), (O'Shea). Re Canadian Air Lines Employees Association and Air Canada (1971), 23 L.A.C. 406 (Bairstew). Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 361 and Moosehead Breweries, Halifax, August 27, 1986, (Outhouse), unreported. Re National Association of Broadcast Employees and Technicians and the Canadian Broadcasting Corporation (1966), 17 L.A.C. 218. Minnesota Mining and Manufacturing (1961), 12 L.A.C. 138.

DECISION: 89-074

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Thomas Pittman, for the Union
Jonathan Davies, for the Employer

August 3, 1989

ISSUES: Job posting - Evidence - Burden of proof 3:2413; Skill and ability - Examinations and tests 6:3340; Management rights 5:0000; Promotion, demotion and transfer - Seniority 6:2100; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievor was one of 16 applicants for a job posted by the Employer. The position was awarded to a candidate from outside the bargaining unit with less seniority than the Grievor. The Grievor claims he has the required qualifications for the position, and that the hiring practices, particularly the testing process, were unfair. He asks that he be given the job and that he receive full compensation from the date the position was filled. The Employer argues it had the right to hire whom it chose, and that it acted reasonably and fairly throughout.

AWARD: The grievance fails. There was no evidence to support the unfair hiring practices as alleged in the grievance. The Employer acted fairly and had the right to choose the candidate it did select.

AUTHORITIES: Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258 (1985), 21 L.A.C. (3d) 422 at 430-431. Re City of Stratford and Stratford Professional Firefighters' Assoc., Local 534 Int'l. Assoc. of Fire Fighters (1980), 25 L.A.C. (2d) 170 (Shime) at p. 177. Re Toronto Board of Education and C.U.P.E. Local 1325 (1976), 12 L.A.C. (2d) 206 (Hinnegan). Canadian Dictionary of the English Language Houghton Mifflin, 1980. Himmelman, (unreported) November 25, 1986.

DECISION: 89-075

Dartmouth General Hospital and Community Health Centre AND Nova Scotia Nurses Union

Venoit, Milton J. - Arbitrator

Elizabeth Mullaly, for the Union
Kenneth Fowlie, for the Employer

July 20, 1989

ISSUES: Pyramiding of benefits 8:3140; Insurance and welfare plans - Calculation of benefits 8:3300; Vacation - Computation of vacation and vacation pay 8:3230; Statutory holidays - Qualifying days - Illness 8:3123; Working hours and shifts 5:3100.

CIRCUMSTANCES: The Grievor is a nurse who was entitled to take a shift off with pay, partly because she had worked on a paid holiday as set out in the collective agreement, and partly because another paid holiday fell on one of her scheduled days off. The Employer agreed that the Grievor would take a day off with pay, using for pay purposes the holiday time as noted. The Grievor became ill and did not return to work until two days after her scheduled holiday. The Employer paid her sick leave for the two days she was scheduled to work, but paid her for the holiday on the basis she had lieu time coming to her as a result of the above calculations. The Grievor claims payment for the one day of holiday on the basis of lieu time and sick leave.

AWARD: The grievance fails. The effect of the voluntary schedule change by the Grievor created a situation in which she was not obligated to work for the Employer on that day. Because there was no obligation to work, there can be no claim for sick leave benefits.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration (3rd ed.), 1988, para. 8:3140 at p. 8-50. Re Pottinger and Treasury Board May 21, 1981), Public Service Staff Relations Board, A.W.R. Carruthers, Adjudicator, unreported. Re Canadian Brotherhood of Railway, Transport and General Workers and Northside General

Hospital (Ferguson, unreported, July 8, 1982). Re Canadian Brotherhood of Railway, Transport and General Workers, Local 607 and Northside General Hospital (Boudreau, unreported, September 24, 1985). Re Canadian Brotherhood of Railway, Transport and General Workers, Local 607 and Northside General Hospital (S.H. 54434, unreported, Nathanson, J., Supreme Court Trial Division, April 16, 1986). Re Canadian Brotherhood of Railway, Transport and General Workers, Local 607, and The Glace Bay Community Hospital (Crosby, unreported, September 9, 1987).

DECISION: 89-076

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Venoit, Milton J. - Arbitrator

Susan Coen, for the Union
Jonathan Davies, for the Employer

August 21, 1989

ISSUES: Safety - Equipment and clothing 8:4100 ; Interpretation - Words and phrases - Safety devices 8:4100; Statutes - Applied by boards of arbitration 2:2100.

CIRCUMSTANCES: The Grievor is one of nine members of a steel bridge repair crew whose primary function was to sandblast and repaint the bridges operated by the Employer. An occupational health and safety officer visited the worksite and ordered each employee to wear protective clothing. The Union argues that because the order made the wearing of coveralls a requirement, the Employer must provide them at its sole cost. The Employer concedes that coveralls must be worn but does not agree they should bear sole cost.

AWARD: The grievance succeeds. The Employer is obliged to provide coveralls at no cost to the employees. The collective agreement places the burden on the Employer to supply all necessary safety equipment and protective clothing to employees working in unsanitary or dangerous jobs.

AUTHORITIES: Re United Electrical Workers, Local 512, and Delamere and Williams Co. Ltd., (1971), 23 L.A.C. 56 (Johnson). Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141, (1981), 29 L.A.C. (2d) 202 (Burkett). Re Wardair Canada Inc. and Canadian Air Line Flight Attendants' Association, (1987) 28 L.A.C. (3d) 142 (Beatty).

DECISION: 89-077

Technical University of Nova Scotia (Board of Governors) AND Technical University of Nova Scotia Faculty Assn.

Christie, Innis - Chair; McDougall, Donald H.; MacKay, A. Wayne

Blaise MacDonald, for the Union
Eric Durnford, for the Employer

August 22, 1989

ISSUES: Retirement 7:7200 - Compulsory 7:7200; Collective agreement - Overridden by statute 1:4000; Statutes - Applied by boards of arbitration 2:2100; Interpretation 4:2100; Estoppel 2:2200.

CIRCUMSTANCES: The Grievor is a professor who was required by the Employer to retire at the end of the month in which he had his 65th birthday. The Union argues the Grievor should have been allowed to work until the end of the academic year. They request compensation for the difference between pay and benefits received by the Grievor and those he would have been paid had he remained employed for the remainder of the academic year. The Employer argues that the Public Service Superannuation Act overrides the collective agreement and requires the Grievor to retire at the end of the month in which he turned 65.

AWARD: The grievance succeeds. The collective agreement entitled the Grievor to continue his employment until the end of the academic year. However, the agreement was subject to the Public Service Superannuation Act, which required the Grievor to retire at the end of the month in which he turned 65; that is the month in which the Employer required him to retire. But that requirement in turn was subject to the Employer's opportunity under the same Act to seek an extension of the Grievor's employment from Cabinet. The Employer did not take advantage of this opportunity, which is a failure to fulfill its obligations to the Grievor. The Act only affords the Grievor a chance of continuing his employment, not a guarantee, so the Board has left the parties to determine compensation.

DISSENT: McDougall dismisses the grievance. The Union has failed to establish the Employer's liability for the loss of opportunity or chance for the Grievor to continue his employment.

AUTHORITIES: Public Service Superannuation Act, R.S.N.S 1967, s.13(1) (as am., up to and including C.41 of S.N.S. 1986). Burrard Yarrows Corp., Vancouver Division (1981), 30 L.A.C. (2d) 331 (Christie, Chair). Chaplin v. Hicks, [1911] 2 K.B. 786. Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd. [1975], 53

D.L.R. (3d) 748, [1976] 1 S.C.R. 267, 4 N.R. 1. Bell Canada v. OPEIU, Local 131 (1973) 37 D.L.R. (3rd) 561. MacLeod v. Eagan N.S.S.C.

DECISION: 89-078

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

North, Gregory I. - Arbitrator

Kimberley Turner, for the Union
William Wilson, for the Employer

January 9, 1989

ISSUES: Insurance and welfare plans - Entitlement to benefits 8:3320; Management Rights 4:2310; Evidence - Burden of proof - Applications - Illness - Qualifying for benefits 8:3320; Medical Certificates 7:3250.

CIRCUMSTANCES: This policy grievance concerns two new forms required by the Employer in order for an employee to obtain sick leave benefits. The Union argues the Employer is not entitled to require an employee to provide the information requested on either form, and that such a demand constitutes an infringement on the employee's right to privacy. The Union also argues that the collective agreement already contains a procedure for determining entitlement to sick leave benefits, and no other method is required. The Employer contends that the procedure used to determine whether an employee is entitled to sick leave benefits is a matter left solely to the discretion of management. The Employer maintains that the requirement to complete the two forms in issue is reasonable and not inconsistent with the provisions of the collective agreement.

AWARD: The grievance succeeds in part. The Employer does have relatively unfettered discretion to investigate the health status of an employee claiming sick leave benefits, and this includes modifying sick leave application forms from time to time. However, any attempt to broaden that investigation into areas not directed to the determination of sick leave benefits goes beyond the authority provided to management by the agreement. Each form in issue contains questions not directed exclusively to the state of health of the employee and are therefore inappropriate and must be omitted from the form as directed.

AUTHORITIES: Halifax Infirmary Hospital (1982), 54 N.S.R. (2d) 289. Dartmouth General Hospital and Community Health Center (unreported and undated, 1984, MacDougall, Larkin and Darby, Chairman). Victoria General Hospital (unreported, February 11, 1982, Christie).

DECISION: 89-079

Metropolitan Transit Authority AND Amalgamated Transit Union, Local 508

Darby, Peter E. - Arbitrator

Kimberley H.W. Turner, for the Union
Amery Boyer, for the Employer

August 25, 1989

ISSUES: Work assignment - Bargaining unit work 5:1200; Interpretation - Words and phrases - Bargaining unit work 5:1200; Policy grievance - Work assignment outside unit 5:1500; Management rights 5:0000; Past practice 3:4430; Estoppel 2:2210.

CIRCUMSTANCES: This policy grievance alleges the Employer is using supervisory personnel to perform bargaining unit work during night shifts when no storemen personnel are on duty. The Union seeks an order directing the Employer to cease its violations of the agreement in requiring or permitting a non-bargaining unit employee to perform the tasks of storemen during the shifts in question. The Employer claims the work in question is not covered by classifications in the collective agreement. In addition, the Employer argues that the storemen's work being performed by the night foreman represents only a fraction of the typical workload of a storeman, and is not sufficient to justify the inclusion of the night forman in the bargaining unit.

AWARD: The grievance succeeds. The night foreman is clearly performing bargaining unit work and the Employer's arguments are peripheral to that conclusion. The Employer is directed to cease its unlawful practice of having bargaining unit work performed by employees outside the bargaining unit.

AUTHORITIES: Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1974), 5 L.A.C. (2d) 344 (Rayner) p.346. Brown and Beatty, Canadian Labour Arbitration, (3rd ed.) 1988, p. 5-10; 3-41-3.

DECISION: 89-080

Dineen Construction Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Outhouse, Bruce - Arbitrator

Ray Larkin, for the Union
Keith MacRae, for the Employer

August 29, 1989

ISSUES: Union - Security - Check off 9:1200; Work assignment - Bargaining unit work 5:1200.

CIRCUMSTANCES: The Union alleges that the Employer assigned carpentry work to labourers rather than to its members. The Union claims two additional carpenters should have been hired and seeks compensation for that amount. The Employer admits that it assigned some carpentry work to labourers, but argues it was working with a composite crew of both labourers and carpenters and the work was distributed fairly.

AWARD: The grievance succeeds. As the Employer admitted they had breached the agreement, the only issue relates to remedy. The Employer is directed to pay the Union the equivalent of 17 weeks in lost wages and benefits.

AUTHORITIES: Yorkdale Drywall Limited v. United Brotherhood of Carpenters and Joiners of America, Local 83 (1987), 79 N.S.R. (2d) 444 (N.S.S.C.,A.D.).

DECISION: 89-081

Halifax (City) AND Halifax Civic Worker's Union, Local 108

Scaravelli, N.M. - Chair; Moreash, Michael; Ross, Joe

David Fisher, for the Union
Mary Ellen Donovan, for the Employer

August 15, 1989

ISSUES: Safety - Equipment and clothing 8:4100 ; Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612; Reasonableness - Discipline 7:4100; Grievance procedure - Compliance with 2:3120.

CIRCUMSTANCES: The Grievor seeks to recover her costs for replacing safety shoes the Employer requires all employees to wear. The Grievor claims her shoes were stolen and that the Employer did not act reasonably by refusing to buy her a replacement pair. The Employer argues that it has no obligation to replace safety shoes other than once per year. The Grievor had not reported the shoes stolen, and in addition, had failed or refused to wear her safety shoes for a period of time prior to the grievance.

AWARD: The grievance fails. The Employer did not act unreasonably in its decision to refuse replacement of the Grievor's safety shoes. It is the Grievor's responsibility to wear and look after her shoes, and she should have reported their theft.

AUTHORITIES: Occupational Health and Safety Act of Nova Scotia s. 9[1]. Canadian Keyes Fibre Co. Ltd. and United Paper Workers International Union, Local 576 8 N.S.R. (2d) 81.

DECISION: 89-082

Victoria General Hospital AND Canadian Brotherhood of Railway, Transport and General Workers, Local 606

Cromwell, T.A. - Arbitrator

Gordon Forsyth, for the Union
Jonathan Davies, for the Employer

August 21, 1989

ISSUES: Discipline and discharge - Grounds for - Absence from work 7:3100 - Failure to notify employer 7:3110, - Just cause 7:1200, - Prior record 7:4314; Disciplinary penalties - Reasonableness 7:4300; Innocent absenteeism 7:3210; Remedies - Substitution of lesser penalty 2:1470.

CIRCUMSTANCES: The Grievor was dismissed for excessive innocent absenteeism and failure to notify his employer he would not report for his shift. The Union asks that he be reinstated with compensation. The Employer argues that the Grievor's repeated absences and his failure to call in sick on three occasions are sufficient grounds for his dismissal.

AWARD: The grievance succeeds. The Employer had just cause for the imposition of discipline, but the discharge was not just and reasonable. The discharge is vacated and in its place a 30-day suspension is imposed. The Grievor's reinstatement is subject to the condition that the Employer may discharge him if his rate of absenteeism exceeds the Departmental average for a six month period following his reinstatement.

AUTHORITIES: Re Local Union No. 1928 of the International Brotherhood of Electrical Workers and the Nova Scotia Power Corporation (unreported), December 21, 1984, (Archibald). Re: U.A.W. and Massey Ferguson Limited (1969), 20 L.A.C. 370 (Weiler). Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p. 371. Re Molson's Brewery (Ont.) Limited and United Brewery Workers Local 304, (1984) 13 L.A.C. (3d) 112 (Brandt) at 122-123. Re Amalgamated Transit Union, Local 508 and Metropolitan Transit Commission (July 22nd, 1982, Outhouse).

DECISION: 89-083

National Construction Ltd. AND International Brotherhood of Electrical Workers, Local 625

MacLellan, J.A. - Arbitrator

Gordon Forsyth, for the Union
Karin McCaskill, for the Employer

September 7, 1989

ISSUES: Discipline and discharge - Grounds for 7:3000, - Refusal to obey instructions 7:3610, - Just cause 7:1200; Remedies - Substitution of lesser penalty 2:1470.

CIRCUMSTANCES: The five Grievors were part of a large group taking their lunch break in the Employer's lunchroom. The Superintendent entered the lunchroom, saw some men playing cards, and ordered them to return to work because their lunch break was over. The Grievors were the only ones of the 20 to 25 men at the table that the Superintendent dismissed, since he was only able to identify them. The Employer contends the Grievors were gambling on company time, as their lunch break had been over for a few minutes.

AWARD: The grievance succeeds. The Grievors were indeed slow in leaving the lunch room, but it was only a matter of three or four minutes, which is not so slow as to warrant their dismissal. This unjust dismissal should be replaced with a written warning placed in their files advising that they are not to be late in leaving the lunchroom after breaks. The Grievors should be reimbursed by the Employer for all lost wages and benefits from the date of their dismissal until their immediate return to work.

DECISION: 89-084

Sigma Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Kydd, William H. - Arbitrator

Ronald Pink, for the Union
Ian Holloway, for the Employer

September 8, 1989

ISSUES: Bargaining unit - Contracting out 5:1300; Union - Security - Check off 9:1200; Intention of the parties 4:2100; Evidence - Burden of proof 3:2400 .

CIRCUMSTANCES: The Grievors allege the Employer let a contract to a non-unionized sub-contractor while operating as a general contractor. The Union seeks full compensation for all wages and benefits lost by its members because of the violation. The Employer contends it was not acting as a general contractor but as a project manager and did not let the contract in question. In the alternative the Employer argues there was no breach because the Union could not supply competent workmen for the job.

AWARD: The grievance succeeds. Notwithstanding the form of the arrangement, the Employer was acting as a general contractor and therefore bound to the collective agreement. In addition, there is insufficient evidence to indicate the Union was unwilling or unable to provide competent workmen. Damages shall be paid to the Union in trust for those members who were unemployed and entitled to the work at the time in dispute.

AUTHORITIES: Dalton Engineering and Construction Limited and Rumble Pontiac Buick (1985) Inc. and the Labourers International Union, O.L.R.B. June 30, 1988. Litwin Construction (1973) Limited [1982] 2 CAN L.R.B.R. 349. Blackwood Hodge Atlantic Limited v. Connolly (1977) 25 N.S.R. (2d) 621. Wolfe Stevedores (1968) Lindon v. Joseph Salters Sons Limited (1970), 2 N.S.R. (2d) 269. Re International Union of Operating Engineers, Local 844, and Labatts Ontario Breweries Limited (1964), 31-10-65 L.A.C. 351. Re Operating Engineers and Molsons Breweries (Ontario) Limited (1958) 31-5-59 L.A.C. 147. Re Retail Store Employees Union Local Number 832 and Canada Safeway Limited (1973) 14 D.L.R. (3d) 449 (Manitoba Court of Appeal). Re Blouin Drywall Contractors Limited v. The United Brotherhood of Carpenters and Joiners of America Local 246 (1975), 57 D.L.R. (3d) 199.

DECISION: 89-084.A

Sigma Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

Glube - CJTD (NSTD)

Ron Pink, for the Union
Ian Holloway, for the Employer

April 25, 1990

ISSUES: Judicial review 1:5000 - Grounds for review - Error of law on face of record 1:5400, - Privative clause 1:5300, - Standard of review of arbitral interpretation 1:5400.

CIRCUMSTANCES: The Employer seeks an order setting aside in part an arbitrator's award which ruled, inter alia, that the Union's delay in referring the matter to arbitration did not constitute a failure to mitigate, as either party could have referred the issue to arbitration. The Employer argues there is an error in law on the face of the record. The Union submits firstly that s. 103(1) of the Trade Union Act constitutes a privative clause, and that the award cannot be appealed. Alternatively, if the award can be appealed, the Union argues that there was not an error of jurisdiction nor a patently unreasonable decision.

AWARD: The application is dismissed. S. 103(1) does not constitute a privative clause. Arbitral awards can be reviewed for errors of jurisdiction, natural justice, or patently unreasonable decisions. In this instance, there was no error of law in the arbitrator's award which would support the quashing of the award.

AUTHORITIES: Yorkdale Drywall Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 83 (1987), 79 N.S.R. (2d) 444; 196 A.P.R. 444 Retail Store Employees Union Local Number 832 and Canada Safeway Limited, Re (1973), 14 D.L.R. (3d) 449 Canadian Broadcasting Corp. v. Le Syndicate des Employees de Production du Quebec et de l'Acadie (1984), 55 N.R. 321; 14 D.L.R. (4th) 457 (S.C.C.) Trade Union Act, S.N.S. 1972, c.19, ss. 103(1), 103(8).

DECISION: 89-085

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781

Ferguson, Robert F. - Arbitrator

Blaise MacDonald, for the Union
Charles Broderick, for the Employer

September 8, 1989

ISSUES: Seniority - Applications - Vacancy 5:2510, - Promotion, demotion, transfer 6:2100; Vacancy 5:2510; Past Practice 3:4430.

CIRCUMSTANCES: The Grievor is a Pupil Aid working in one of two transitional classes. When one of these classes was cancelled, the Grievor, who had more seniority than the other Pupil Aid, wished to stay with the remaining transitional class. When classes started in September 1988, the Grievor was placed in an intermediate class which had not previously had a Pupil Aid. The Union alleges the Employer created a new position without following proper procedures. In addition, the Grievor has more seniority and should be allowed to stay in the transitional class. They ask that the Grievor be reinstated to her previous position. The Employer argues the Grievor was merely reassigned to perform her same job functions in the intermediate class and that no promotion, vacancy or creation of a new position occurred.

AWARD: The grievance succeeds. The Employer created a new position by the manner in which the Pupil Aid (intermediate class) position was filled. The Grievor is reinstated to the position she held prior to her placement in September 1988. The position in which she was placed, being a new position, should be dealt with as prescribed in the collective agreement.

AUTHORITIES: Re Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50 L.A.C. (3d) 386. Canadian Union of Public Employees, Local 232 (781) and Cape Breton District School Board (unreported) December 17, 1983.

DECISION: 89-086

Metropolitan Authority AND Amalgamated Transit Union, Local 508

DeMont, Eric G. - Arbitrator

Kimberley H.W. Turner, for the Union
Amery Boyer, for the Employer

September 14, 1989

ISSUES: Insurance and welfare plans - Calculation of benefits 8:3300, - Payment of premiums 8:3310, - Incorporation into collective agreement 4:1200; Interpretation 4:2100.

CIRCUMSTANCES: The Union alleges that the Employer amended the group insurance plan by changing the drug plan from a direct pay plan to a reimbursement plan. The collective agreement has been violated because the benefits of the new plan were not equal to the benefits of the old. The Employer's position is that as long as there is full reimbursement for prescription drugs, the current plan is at least equal to the earlier one. It argues the questions such as inconvenience of reimbursement, and unavailability of funds for the original payment are not to be considered because these are not benefits of the plan itself.

AWARD: The grievance succeeds. Although it appears that the reimbursement plan would have been to the advantage of the average Union member because of lower actual cost, the Union does not view it in that manner and is entitled to rely on the terms of the collective agreement. The present plan does not have benefits equal to those in force at the signing of the agreement. The Employer is directed to put into place a plan that has the benefits required in the agreement. The award is to take effect on the decision date, and the Union will allow the Employer sufficient time to make new arrangement for a group insurance plan.

AUTHORITIES: Pacific Press 15 L.A.C. (2d) 113.

DECISION: 89-087

T.D. Chiasson Electric (1979) Ltd. AND International Brotherhood of Electrical Workers, Local 625

Kydd, William H. - Arbitrator

Gary Gaul, for the Union
Daniel L. Weir, for the Employer

August 31, 1989

ISSUES: Wages - Time not worked 8:1420, 8:3700, - Mode of payment 8:1400; Disciplinary penalties - Types of penalties - Monetary penalties - Fines 8:1420; Collective agreement - Matters arising outside of 2:1200.

CIRCUMSTANCES: The four Grievors were dismissed for taking discarded electrical material, selling it for scrap, and keeping the proceeds. The Union argues the Grievors were entitled to one week's pay, plus one day, plus one hour on the day they were dismissed, for a total of 49 hours. After some delay due to their negotiations, the Employer issued cheques for 40 hours. The Employer deducted nine hours pay from each employee on the basis that the Grievors spent at least that much time carrying away and storing the scrap material for their personal benefit.

AWARD: The grievance succeeds. In the absence of a provision in the collective agreement, the Employer does not have the right to fine employees and deduct those fines from their pay. Each of the Grievors is entitled to wages and benefits for eight hours and fifteen minutes to compensate for the amount deducted. In addition, the payment for the 40 hours was outside the time-limits imposed by the agreement, and the Grievors are therefore entitled to receive an additional sum equivalent to eight hours pay at straight time rates.

AUTHORITIES: Re: Farmer et al and Total Salon Concept Limited (May 9, 1980), unreported (L.S.T. No. 118). Canadian Brotherhood of Railway, Transport and General Workers and Lawrence Sweeney Fisheries Limited, unreported, Outhouse, Arbitrator.

DECISION: 89-088

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1

Kydd, William H. - Arbitrator

Les Holloway, for the Union
John Clark, for the Employer

September 8, 1989

ISSUES: Evidence - Burden of proof - Applications - Work assignment outside classification 3:2414; Work assignment - Bargaining unit work 5:1200; Management rights - Job standard 4:2310; Overtime - Distribution of overtime 5:3220; Past Practice 3:4430.

CIRCUMSTANCES: Two grievances are filed involving a dispute over which trade is entitled to perform blocking in the Employer's shipyard. In the first instance, the Union contends that the work requires the use of two joiners, and instead the Employer used one joiner and one stagebuilder. In the second situation, four joiners were not brought in to perform certain blocking work they had done in the past. The Employer argues for the first grievance that the two workers were only there on standby because the blocking work was already done. Furthermore, any crossing of jurisdictional work by the stagebuilder was of such a minor nature that it could not be looked at as a breach of the agreement. In the second grievance, the Employer argued that the amount of work was insufficient to employ joiners full time.

AWARD: The first grievance cannot be resolved because the parties differ in their statements of fact. The second grievance succeeds. The Employer's past practice indicates that the proper trades people should be brought in even when the amount of work involves as little as fifteens minutes work. The four Grievors should be compensated for fifty per cent of lost overtime to a maximum of $150 each.

DECISION: 89-089

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada, Local No. 1

Kydd, William H. - Arbitrator

Les Holloway, for the Union
John Clark, for the Employer

September 8, 1989

ISSUES: Overtime - Distribution of overtime 5:3220 - Equitable distribution 5:3224, - Scheduling 5:3200.

CIRCUMSTANCES: The five Grievors claim they were not given the opportunity to work overtime when their names were next on the rotation list. They allege the Employer retained the workers who were already working an overtime shift to complete the job rather than move to the rotation list. They ask for the compensation that would be due them if they had worked. The Employer argues the additional overtime was not planned, but was necessary to enable the work to be completed before the next regular shift. This is a valid business reason for continuing with the assigned employees and therefore the agreement was not violated.

AWARD: The grievance succeeds. There is no provision in the agreement for the Employer's argument. Therefore, the initial work period should have been 8 hours long, with recourse to the rotation list at its completion. The Grievors shall be rewarded fifty per cent of the lost overtime to a maximum of $150 each.

DECISION: 89-090

Protan Scotia Marine Canada Ltd. AND Energy and Chemical Workers' Union, Local 856

MacLellan, J.A. - Chair; McDougall, Donald; Grant, Denis

George Morrison, for the Union
Peter McLellan, for the Employer

September 18, 1989

ISSUES: Work assignment - Bargaining unit work 5:1200, - Contracting out 5:1300 - Employees outside unit 5:1400; Contracting out 5:1300; Employee defined 5:1122 - Independent contractor distinguished 5:1122, 5:1300.

CIRCUMSTANCES: The Employer posted a notice asking for additional staff to harvest rockweed. When only one of the five applicants was interested in working a night shift, the Employer hired four men from outside the bargaining unit to work as independent contractors. Several months later the Employer attempted to lay off two bargaining unit employees from the day shift; the men were eventually transferred to another part of the operation and were never actually laid off. The Union argues the Employer cannot lay off bargaining unit employees until all of the contract employees are first laid off. The Employer maintains the night harvesters are separate and distinct from bargaining unit employees and therefore not subject to the collective agreement.

AWARD: The grievance succeeds. The testimoney does not support the Employer's contention that the night harvesters are independent contractors. The Board finds the night harvesters should be classified as employees of the Company. However, they shall continue to be employed as independent contractors until a new collective agreement has been agreed upon by the parties.

DECISION: 89-091

Maritime Warehousing and Transfer Co. Ltd. AND Bakery, Confectionery and Tobacco Workers' International Union, Local 446

Darby, Peter E. - Chair; Durnford, Eric; Mitchell, Glenn

Rene Quigley, for the Union
Donald H. McDougall, for the Employer

August 28, 1989

ISSUES: Discipline and discharge - Just Cause 7:1200, - Grounds for - Alcoholic beverages 7:3560 - Lateness 7:3140, - Evidence - Burden of proof 7:2300, 3:2411; Evidence - Exclusionary rules - Hearsay 3:4310; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000.

CIRCUMSTANCES: The Grievor was discharged for arriving for work one hour late and allegedly under the influence of alcohol. The Grievor denies impairment. The Union argues that factually, there was no just cause for dismissal, and even if there were, a lesser penalty should be substituted.

AWARD: The grievance fails. The majority accepts the Employer's evidence and determined that the penalty of termination is just and reasonable under the circumstances.

DISSENT: (Mitchell) The grievance should succeed. The Employer has not satisfied the onus of proving just cause for discharge.

AUTHORITIES: Re Hamilton Street Railway Co. and Amalgamated Transit Union, Divison 107, [1972] 22 D.L.R. (3rd) 658 (Ont. H.C.) at p. 662. Valley Rite-Mix Ltd. v. Teamsters Local Union 213, [1975] 1 W.W.R. 685 (B.C.C.A). United Food and Commercial Workers, Local 125 and Canso Sea Products Limited (March 4, 1985), (Outhouse) unreported. Dairy Producers Co-Operative Ltd. and Lyons et al., [1982] 132 D.L.R. (3d) (S.C.C.) Re Int'l Union of Electrical Workers, Local 510 and Phillip's Electrical Co. Ltd. (1964), 15 L.A.C. 3. Re United Automobile Workers, Local 195, and Great Lakes Forging Ltd. (1965), 15 L.A.C., 439 at 443 (Palmer). Brown and Beatty, Canadian Labour Arbitration (3rd ed.) at pp. 3-35 and 3-36. Re: The Canadian Paper Workers Union and Nova Scotia Forest Industries 85-86 (Archibald). Re: Rockwell International of Canada Ltd. and United Automobile Workers, Local 1067 (Ellis).

DECISION: 89-092

Dalhousie University AND International Union of Operating Engineers, Local 968

MacLellan, J.A. - Chair; Cunningham, Al; McDougall, Donald

Raymond Larkin, for the Union
Maureen Reid, for the Employer

September 20, 1989

ISSUES: Wages - Overtime pay 8:2100; Management rights 5:0000, - Schedules 5:3100; Collective agreement - Matters arising outside of 2:1200; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The five Grievors were working on a renovation project when the Employer determined that an extra night shift was necessary to meet completion deadlines. The Grievors were moved to the night shift from their regular daytime shift for a period of two weeks. The Union argues that the Grievors should be paid at overtime rates for that period because the night shift was beyond their normally scheduled hours of work. The Employer argues that the Agreement neither restricts them from implementing an evening shift nor requires them to pay overtime.

AWARD: The grievance fails. There is nothing in the Collective Agreement prohibiting the Employer from introducing a temporary evening shift. The Grievors were paid the shift differential as specified in the Agreement.

DISSENT: (Cunningham): The grievance should be allowed. Day workers who are temporarily and not regularly assigned to their normal daytime shift should be entitled to overtime.

AUTHORITIES: Hawker Siddeley Canada Inc. Trenton Works Division v. United Steelworkers of America, Local 1231 (1983) 59 N.S.R. (2d), p. 42.

DECISION: 89-093

Halifax Water Commission AND Canadian Union of Public Employees, Local 1431

Outhouse, Bruce - Arbitrator

Alvin Hughes, Ray Hill, for the Union
Paul Murphy, for the Employer

September 20, 1989

ISSUES: Management rights 5:0000; Job classifications and descriptions - Creation or revision 5:2000, - Collective agreement limitations 5:2200, - Bona fides 5:2300; Interpretation - Intention of the Parties 4:2100.

CIRCUMSTANCES: The Employer reclassified all bargaining unit positions on the basis of a unilateral job evaluation program. The Union argues that the evaluation and reclassification should have been carried out jointly with the Union. The Union requests that the reclassifications and the job evaluation program be declared invalid and that the Employer be directed to undertake a joint job evaluation program based on a specific plan proposed by the Union, or some other gender-neutral plan as directed by the Arbitrator. The Employer maintains they acted correctly by consulting with the Union at all stages of the evaluation and reclassification, acting unilaterally only when they could not reach agreement with the Union.

AWARD: The grievance fails. There is nothing in the Agreement requiring the job evaluation program to be carried out jointly between the Employer and the Union. In addition, the Employer acted reasonably and in good faith. The Collective Agreement does provide the Union with another avenue of redress if it feels the classifications and/or the rates of pay were improperly established as a result of the job evaluation program.

AUTHORITIES: Re The Hydro Electric Commission of the City of York and the Canadian Union of Public Employees (May 5, 1989), unreported (File No. 89.0033), (Mather).

DECISION: 89-094

CIP Inc., Canexel Hardboard Division AND Canadian Paperworkers Union, Local 434

Outhouse, Bruce - Arbitrator

Ray Larkin, for the Union
Greg North, for the Employer

September 21, 1989

ISSUES: Working hours and shifts 5:3100; Management rights 5:0000; Past practice 3:4430; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievor is a shift worker who normally works a five-day week with two rest days. The Employer has frequently posted a schedule to that effect, then added a handwritten note requiring certain employees to work a sixth day. The Union argues that this constitutes a change in scheduled days off and therefore violates the collective agreement. The Union seeks a declaration by the Employer admitting the violation; no financial or other relief is sought. The Employer maintains there is nothing in the agreement entitling shift workers to two rest days per week.

AWARD: The grievance fails. The agreement is rather ambiguous on the point of entitlement to two rest days, but the evidence of past practice is compelling. The agreement specifies only one rest day per week, allowing for a six-day shift with overtime paid on the sixth day.

AUTHORITIES: Labour Standards Code S.N.S. 1972, C. 10, s. 63, as amended.

DECISION: 89-095

Scotsburn Co-Operative Service Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

Scaravelli, N.M. - Arbitrator

Roseanne Skoke, for the Union
James Leefe, for the Employer

September 26, 1989

ISSUES: Discipline and discharge - Grounds for - Loss of qualifications 7:3510, 7:7510, - Off-duty conduct 7:3010, - Collective agreement limitations 7:1300; Disciplinary penalties - Reasonableness 7:4300; Evidence - Burden of proof - Applications - Discipline 3:2411; Time-limits - Restriction on arbitrability 2:1100.

CIRCUMSTANCES: The Grievor is a driver-salesman who was discharged from his position after the employer learned he had driven company vehicles while his driver's license was suspended for impaired driving. He did not report this to his Employer, and continued to drive for six months, at which time he went on disability. The Union argues the penalty of discharge was unduly harsh, and that too much time had elapsed from the time the Grievor went on compensation to the time of the discharge. The Grievor seeks reinstatement to his position with no loss of benefits or other rights. The Employer argues that the Grievor's failure to report the loss of his license was an act of dishonesty which exposed the Company to potential liability in the event of an accident. In addition, the Grievor's actions amounted to a misuse of the Employer's property, constituting grounds for dismissal.

AWARD: The grievance fails. The Employer had just cause for imposing the penalty of discharge and it was a reasonable response in this situation. The continued act of dishonesty placed a strain on the employment relationship to the extent the Employer could no longer consider the Grievor trustworthy.

AUTHORITIES: Brown and Beatty Canadian Labour Arbitration, (3d ed.) p. 7-5 [para. 7:1300] and p. 7-144 [para. 7:4300].

DECISION: 89-096

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Peter MacLellan, for the Employer

October 2, 1989

ISSUES: Work assignment - Bargaining unit work 5:1200, - Contracting out - Employees outside unit 5:1400; Bargaining unit - Employees excluded 5:1120; Management rights 5:0000; Past practice 3:4430.

CIRCUMSTANCES: This policy grievance alleges the Employer has assigned bargaining unit work to assistant managers rather than calling in casual workers who are members of the bargaining unit. The Union seeks a declaration that such assignment is contrary to the collective agreement and an order that the practice cease. The Employer concedes that the assistant managers do perform a minor amount of bargaining unit work, but that is within the parameters of the agreement. They contend that such work is performed only as necessary, and not on a pre-assigned basis.

AWARD: The grievance fails. The work being performed by the assistant managers and manager would not occupy a bargaining unit employee for a full shift on an ongoing basis. In these circumstances, the implied restriction on management's right to assign bargaining unit work to non-unit employees has not been breached.

AUTHORITIES: Re Retail, Wholesale, and Department Store Union, Local 414 and Versa Food Services Limited (1971), 23 L.A.C. 19. Re Irwin Toy Ltd. and United Steelworkers (1982) 6 L.A.C. (3d) 328. Re Becker Milk Company Ltd. and Teamsters, Local Union 647, (unreported), August 7, 1980. Re United Steelworkers, Local 3589 and American-Standard Products (of Canada) Ltd. (1961), 11 L.A.C. 283. Re Canadian Union of Operating Engineers and Liquid Carbonic Canadian Corp. Ltd. (1965) 16 L.A.C. 181. Re International Electrical Workers, Local 566 and J.A. Wilson Display Ltd. (1963) 14 L.A.C. 63. Brown and Beatty, Canadian Labour Arbitration (3d ed.) p. 5-15 [para. 5:1400]; 4-26 [para 4:2100]; 5-14 - 5-16 [para. 5:1400]. Lyndon v. Standbridge (1857), 157 E.R. 19. Re Irwin Toy Ltd. and United Steelworkers (1982), 6 L.A.C. (3d) 328.

DECISION: 89-097

Clarence (Kloosterhof) Farm Services Ltd. AND United Food and Commercial Workers Union, Local 1252

Outhouse, Bruce - Arbitrator

Susan Coen, for the Union
David Gruchy, for the Employer

October 4, 1989

ISSUES: Promotion, demotion and transfer - Seniority 6:2000, 6:2100; Skill and ability 6:3000, - Criteria of ability and qualifications 6:3300; Good faith - Skill and ability 6:3100; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: The Grievor applied for the position of day shift leadhand, but it was awarded to a candidate with lesser seniority. The Union argues the Grievor possesses the required qualifications and that, plus his seniority, should have guaranteed him the position. In addition, the Union contends the Employer discriminated against the Grievor because of a conflict between the Grievor and the plant production manager. The Union requests that the Grievor be awarded the day shift leadhand position immediately and that he be compensated for any financial loss he has suffered as a result of not being appointed to the position. The Employer takes the position that the Grievor lacked the required qualifications for the position, thus warranting awarding it to someone with lesser seniority. They point out that the Grievor had been demoted from a similiar position because of his inability to cope, and that he had done nothing to improve his qualifications in the meantime.

AWARD: The grievance fails. The charge of discrimination has not been substantiated, although it is clear there is a personality conflict between the Grievor and the plant production manager. In addition, the Employer has acted reasonably in determining that the Grievor lacks the necessary qualifications for the leadhand position based on his performance.

AUTHORITIES: Re Board of Commissioners of Police for the City of Sault Ste. Marie and Sault Ste. Marie Police Association (1982), 3 L.A.C. (3d) 208 (Kennedy). Re Firestone Steel Products of Canada and United Automobile Workers, Local 27 (1975), 8 L.A.C. (2d) 164 (Brandt). Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 707 (1976), 12 L.A.C. (2d) 334 (Palmer). Re Canadian Union of Public Employees and the City of Toronto (December 3, 1985), unreported, (Springate). Boeing of Canada Ltd. and International Association of Machinists, Lodge 1542 (1987), 29 L.A.C. (3d) 1 (Kates).

DECISION: 89-098

Technical University of Nova Scotia (Board of Governors) AND Technical University of Nova Scotia Faculty Assn.

MacLellan, J.A. - Arbitrator

Howard Snow, for the Union
Eric Durnford, for the Employer

July 5, 1989

ISSUES: Arbitrability - Procedural limitations - Exhaustion of grievance procedure 2:3128, - Effect of express limitations in collective agreement 2:1100; Jurisdiction - Sources - Collective agreement 2:1200.

CIRCUMSTANCES: This regards a preliminary matter in a pending grievance on unjust dismissal. The Grievor argues that a finding be made that he is still an employee until a decision is rendered on the merits of the grievance. He maintains his dismissal can only become effective upon the exhaustion of the grievance procedure, or until this arbitration has concluded. The Employer argues the Arbitrator has no jurisdiction to make the finding requested by the Grievor. In addition, the Employer maintains the agreement states only that the salary and benefits of the Grievor shall continue until the arbitration has concluded.

AWARD: The preliminary motion is dismissed. The Arbitrator has no jurisdiction to make the finding asked for by the Grievor.

DECISION: 89-099

Technical University of Nova Scotia (Board of Governors) AND Technical University of Nova Scotia Faculty Assn.

MacLellan, J.A. - Arbitrator

Howard Snow, for the Union
Eric Durnford, for the Employer

October 6, 1989

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310, 7:3312, 7:3314, - Unco-operative behaviour 7:3660, - Failure to get along with work mates 7:3580, - Refusal to obey instructions 7:3610; Disciplinary penalties - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor is a tenured full professor who was dismissed from his position for submitting a false and/or improper expense claims, and for misuse and abuse of services and personnel. The Grievor denies any wrongdoing and seeks reinstatement without loss of pay and benefits. The Union admits to some wrongdoing by the Grievor, but argues the penalty is too severe. The Employer presented documentation and evidence detailing the expense claims improprieties and unwillingness of the Grievor to cooperate with the Employer.

AWARD: The grievance fails. The Grievor has overstepped the bounds of proper behaviour and nothing can justify his actions towards support staff or co-workers. The Employer has also proven its case that the Grievor was dishonest in the filing of false and improper expense claims. The Arbitrator found absolutely no grounds for mitigations of the penalty under the circumstances.

DECISION: 89-100

Grace Maternity Hospital (Board of Management) AND Nova Scotia Nurses' Union

Bruce, Brian - Chair; Mann, Thomas; McDougall, Donald

Elizabeth Mullaly, for the Union
Eric Durnford, Maureen Reid, for the Employer

September 29, 1989

ISSUES: Insurance and welfare plans - Calculation of benefits 8:3300; Vacation - Computation of vacation and vacation pay 8:3220, 8:3230 - Period of service 8:3220; Statutory holidays - Holiday pay and other benefits 8:3140; Interpretation - Intention of the parties 4:2100; Past practice 3:4430.

CIRCUMSTANCES: This policy grievance alleges the employees have a right to accumulate sick leave, vacation, and holiday benefits while on a leave of absence without pay or while on Workers' Compensation with no top-up. The Union argues that the correct approach is to calculate benefits on the basis of whether the nurse has status as an employee. The Employer's practice has been to base calculation of entitlements on hours worked or deemed to have been worked in the previous year. A leave of absence without pay greater than 30 days is not considered to be hours worked.

AWARD: The grievance fails. The Majority concluded that vacation and sick leave entitlement for all employees is based on days worked, and not accumulated during a leave of absence without pay. Similarly, an employee on Workers' Compensation is not entitled to accumulate vacation benefits.

DISSENT: (Mann) The grievance should be allowed. The collective agreement is not ambiguous in stating that nurses shall accumulate sick leave at the rate of 2.5 days per month, with no distinction made regarding employment status. Likewise, no reference is made to holidays and vacations being "earned" by virtue of hours worked.

AUTHORITIES: Aberdeen Local of the Nova Scotia Nurses' Union v. Aberdeen Hospital Commission (unreported, Darby) (July 29, 1988). Re Andres Wines (B.C.) Ltd. and Brewery and Soft Drink Workers, Local 300 (1977) 16 L.A.C. (2d) 422 (Bird). Re the Food Group Inc., and Retail, Wholesale and Department Store Union, Local 1065 (1986), 23 L.A.C. (3d) 434 (Bruce) at p. 439. Re City of Timmins (Golden Manor Home for the Aged) and Ontario Nurses' Association (1987), 26 L.A.C. (3d) 444 (Betcherman). Re United Automobile Workers, Local 569 and Sealed Power Corp. or Canada Ltd. (1971), 22 L.A.C. 371 (Shime). Re Caressant Care Nursing Home and Service Workers Union (1987), 29 L.A.C. (3d) 347 (watters). Re Toronto General Hospital and Ontario Nurses Association (1977), 16 L.A.C. (2d) 113 (Brown). Palmer, E.E. Collective Agreement Arbitration in Canada (2nd ed.) at p. 131.

DECISION: 89-100. A

Grace Maternity Hospital (Board of Management) AND Nova Scotia Nurses' Union

Richard - J (NSTD)

Gordon N. Forsyth, for the Union
Eric Durnford, Maureen E. Reid, for the Employer

May 24, 1990

ISSUES: Judicial review - Grounds for - Error of law on face of record 1:5400; Precedent - Decisions of boards of arbitration 1:3000.

CIRCUMSTANCES: A policy grievance over the Employer's refusal to allow employees on leave of absence to accumulate vacation, holiday, and sick-leave credits was dismissed. The union appeals the award on the grounds that it is patently unreasonable, and contrary to another arbitration board's award.

AWARD: The appeal is dismissed. Arbitration boards are not bound by precedent. The decision is not patently unreasonable. "The rules of interpretation applicable to commercial contracts...do not have general application to collective agreements."

AUTHORITIES: Blanchard v. Control Data (Canada) Limited (1984), 55 N.R. 194; 14 D.L.R. (4th) 289 (S.C.C.). Public Service Alliance of Canada v. Canada Post Corporation (1988), 83 N.S.R. (2d) 215; 210 A.P.R. 215. Huestis v. New Brunswick

Electric Power Commission (1979), 25 N.B.R. (2d) 613; 51 A.P.R. 613; 27 N.R. 103; 98 D.L.R. (3d) 622 (S.C.C.). Hillis Oil and Sales Limited v. Wynn's Canada Limited (1983), 53 N.S.R. (2d) 421; 109 A.P.R. 421, affd. [1986] 1 S.C.R. 57; 71 N.S.R. (2d) 353; 171 A.P.R. 353. Food Group Inc. v. Retail, Wholesale and Department Store Union, Local 1065, Re (1986), 23 L.A.C. (3d) 347. Caressant Care Nursing Home and London and District Service Workers' Union, Local 220, Re (1987), 29 L.A.C. (3d) 347. Toronto General Hospital and Ontario Nurses' Association, Re (1977), 16 L.A.C. (2d) 113. Nova Scotia Nurses' Union, Camp Hill Hospital Local v. Camp Hill Hospital (1989), 94 N.S.R. (2d) 430; 247 A.P.R. 430. Weatherill, The Binding Force of Arbitration Awards (1958), 8 L.A.C. 323.

DECISION: 89-101

Lunenburg (Town) AND Police Assn. of Nova Scotia, Local 297

Kelly - JTD (NSTD)

David W. Fisher - (applicant), for the Union
Jan E. Silliker - (respondent), for the Employer

June 8, 1989

ISSUES: Judicial review - Grounds for review - Excess of jurisdiction 1:5300, - Error of law on face of record 1:5400; Overtime 5:3200 - Compulsory 5:3210.

CIRCUMSTANCES: The Grievor was ordered by his employer to attend a one-day training course. The Grievor applied for overtime pay for the course, but the Employer refused to pay him on the basis that course attendence was voluntary. The Majority dismissed the grievance. The Union applied to the Nova Scotia Supreme Court, Trial Division for an order to quash and set aside the majority award of MacDougall, arguing that the Board exceeded jurisdiction by answering a question not directed to it, or that there was an error in law.

AWARD: The application succeeds. The Chair considered the issue to involve no compulsion on the part of the Grievor to attend, whereas the issue involved the Grievor acting on the order of the Employer. Therefore, the Chair exceeded the jurisdiction awarded to the Board by failing to decide the question should be sent back to the same Board for a decision in accordance with the appropriate issue, the facts, the collective agreement, and other directions of this Court. The Union shall have its costs to be taxed.

AUTHORITIES: R. v. Nat Bell Liquors, Limited [1922] 2 A.C. 128 (P.C.) Shalansky et al v. Board of Governors of Regina Pasqua Hospital (1983), 145 D.L.R. (3d) 413, 83

C.L.L.C. 14, 026 (S.C.C.). Re Oil Chemical and Atomic Workers International Union, Local 9-832 and Canadian General Electric Co. Ltd. (1975), 56 D.L.R. (3d) 745 (N.S.S.C., A.D.). Anisminic Ltd. v. Foreign Compensation Commission et al [1969] 2 A.C. 147. de Smith, S.A. Judicial Review of Administrative Action (3rd ed.) 1973, at p. 101.

SEE ALSO:88-113

DECISION: 89-102

Metropolitan Authority (Halifax, Dartmouth and Halifax County) AND Halifax Civic Workers Union, Local 108

MacDougall, R. Lorne - Arbitrator

Michael A. Lambert, for the Union
Terry Roane, for the Employer

September 29, 1989

ISSUES: Discipline and discharge - Grounds for - Fighting or threatening 7:3430; Disciplinary penalties - Types of penalties - Multiple penalties 7:4240, - Reasonableness 7:4300; Promotion, Demotion and transfer - Demotion or transfer - Disciplinary 7:3544.

CIRCUMSTANCES: The two Grievors were suspended for 20 working days and demoted to lower classifications by transfers to different job locations as a result of a shouting match and physical fight between them. They argue the suspensions were unjust, and claim compensation and reinstatement to their former positions. The Employer contends the suspensions were imposed because of the seriousness of the altercation. In addition, the Grievors could not continue to work in the same environment, so the demotions were necessary to tranfer them to separate locations.

AWARD: The grievances succeed. Despite the Employer's intention, the demotions were disciplinary in nature and formed part of the penalty. Neither Grievor had any disciplinary record, and the double penalty of demotion and suspension is not allowed. Each Grievor shall have his suspension reduced to 15 working days, with compensation for the excessive five working days from the original suspension. Grievor A shall be returned to his previous classification with compensation for any loss of pay; Grievor B has already applied for and been granted a position in his previous classification.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3rd ed.) at 7:3430; 7:3546; 7:3440; 7:3544; 7:4240. Re Checkerboard Foods Limited and Ontario Poultry, Dairy, and Allied Workers Council, Local P1105, (1979) 21 L.A.C. (2d), 344. Re Allied and Technical Workers, District 50 and Liquid Carbonic Canada Ltd. (1972), 24 L.A.C. 309. Re International Chemical Workers, Local 721 and Brockville Chemical Industries Ltd. (1971), 23 L.A.C. 336 at p. 339. Re Steel Co. of Canada Ltd. and United Steelworkers, Local 1005 (1974), 7. L.A.C. (2d), 132. Re General Bakeries Ltd. and Bakery, Confectionery, and Tobacco Workers International Union, Local 264 (1985) 21 L.A.C. (3d) 155. Re International Harvester Co. of Canada Ltd. and United Automobile Workers, Local 127 (1974) 5 L.A.C. (2d) 290. Re Nova Scotia Armature Works Ltd. and International Brotherhood of Electrical Workers, Local 625 (unreported, May 11, 1982). Re Halifax Infirmary and C.B.R.T. and G.W., Local 606 (unreported, MacLellan, March 9, 1987). Re Air Canada and Canadian Air Line Flight Attendants Assn. (1979), 22 L.A.C. (2d), 371. Re City of Lethbridge and International Assn. of Fire Fighters, Local 237 (1988) 34 L.A.C. (3d) 165. Re International Chemical Workers, Local 721 and Brockville Chemical Industries Ltd. (1971), 23 L.A.C. 366 at p. 339. Palmer, E.E., Collective Agreement Arbitration in Canada at p. 526.

DECISION: 89-103

Crossley Carpet Mills Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers' Union, Local 612

MacLellan, J.A. - Chair; Leefe, James; Lee, Boyd

Ted Powell, for the Union
Donald H. McDougall, for the Employer

October 18, 1989

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, - Work overtime - Compulsory overtime 7:3634; Disciplinary penalties - Reasonableness 7:4300.

CIRCUMSTANCES: The Grievor is an industrial mechanic who refused to respond to a directive from his supervisor to report to work for an emergency call-in. He was suspended without pay for one day. The Grievor alleges the suspension was without just cause because overtime work is voluntary. He requests that he be reimbursed for lost wages and that the suspension be removed from his file. The Employer argues that call-ins are conducted on a rotation basis and it was clearly the Grievor's turn to be called. More importantly, the Grievor was ordered to come in to work and he refused to respond to this direct order.

AWARD: The grievance fails. The Employer acted reasonably under the circumstances because the Grievor refused to respond to an emergency situation via the Employer's request. The one-day suspension is an appropriate discipline given the Grievor's good work record.

DECISION: 89-104

Inverness Consolidated Memorial Hospital AND Canadian Brotherhood of Railway, Transport, and General Workers, Local 607

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
Kenneth C. Fowlie, for the Employer

October 25, 1989

ISSUES: Work assignment 5:1000 - Bargaining unit work 5:1200; Bargaining unit - Employees excluded - Supervisors and foremen 5:1126; Management rights 5:0000 .

CIRCUMSTANCES: This policy grievance states that the Employer permitted a supervisor to perform bargaining unit work while an employee was on sick leave. The Union asks for all lost wages and benefits for the period of sick leave. The Employer's position is the supervisor is permitted to do bargaining unit work under the collective agreement.

AWARD: The grievance fails. Under the collective agreement, supervisory employees are permitted to do bargaining unit work if there is no loss of employment to union members, and that is the situation here. Therefore, the Employer has not infringed on the terms of the agreement.

DECISION: 89-105

Inverness District School Board AND Canadian Union of Public Employees, Local 955

Outhouse, Bruce - Chair; Hennick, Ken; Wadden, Joe

Gordon Forsyth, for the Union
Arthur Pickup, for the Employer

October 25, 1989

ISSUES: Work assignment - Bargaining unit work 5:1200, - Contracting out 5:1300; Employee - Defined 5:1122; Interpretation - Words and phrases - Employees 5:1122; Contracting Out - Good Faith 4:2310.

CIRCUMSTANCES: The Employer operated cafeterias in two schools which were staffed by Union members. The cafeterias continually lost money and were unable to attain a break-even position, and the Employer closed them and laid off the Union staff. The student councils at the schools then established canteen services, which were run by student volunteers. The Union contends the Employer has assigned bargaining unit work to the students and subcontracted work or services to the suppliers of the food sold in the canteens. The Union requests that the cafeteria workers be rehired or that the practice of preparing and serving food in the cafeterias cease. The Employer argues that students are not employees or independent contractors and are not under the control of the School Board. The students are merely providing a service for themselves.

AWARD: The grievance fails. The student volunteers are not employees and are not performing the same work that was performed by the Union members. The Employer has never entered into any form of contractual arrangement with the student councils operating the canteens, so no sub-contracting situation exists.

AUTHORITIES: Re City of Kelowna and C.U.P.E., Local 338 (1980), 25 L.A.C. (2d) 314 (Larson). Shorter Oxford English Dictionary. Thorco Manufacturing Ltd. (1965), 65 C.L.L.C. 16052. Education Act R.S.N.S. 1967, C. 81 s. 48 (1). Re Air Canada and Canadian Airlines Employees Association (1975) 10 L.A.C. (2d) 113 [O'Shea]. Re Don Mills Foundation (1984), 14 L.A.C. (3d) 385 [Richer]. Montreal v. Montreal Locomotive Works Limited et al [1947]; D.L.R. 161 (B.C./S.C.A.D.). Re U.A.W., Local 1566 and Wean-McKay of Canada Limited (1971), 23 L.A.C. 27 [Palmer]. Labourers International Union of North America, Local 183 v. York Condominium Corporation No. 45 and/or Medhurst Hoggs and Associates Limited [1977] O.L.R.B. Rep. 645. Russellsteel (1966), 17 L.A.C. 253 [Arthurs]. Robin Hood Multi Foods Limited (1980), 26 L.A.C. (2d) 371 [Ladner]. Minnesota Mining and Manufacturing of Canada Limited (1961), 12 L.A.C. 138 [Cross]. Re Country Place Nursing Home and CUPE (1981), 1

L.A.C. (3d) 341 [Pritchard]. Re Electric Reduction Company (1973) 3 L.A.C. (2d) 87 [Hartt]. Re York University and Canadian Union of Public Employees, Local 1356 (1974), 5 L.A.C. (2d) 385 (O'Shea).

DECISION: 89-106

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Cromwell, T.A. - Chair; North, G.I.; Yates, J.

S. Coen, for the Union
J. Davies, for the Employer

August 11, 1989

ISSUES: Company rules - Collective agreement 4:1500; Collective agreement - Amendments 4:1300; Estoppel 2:2210; Past practice 3:4430; Travel allowance 8:3700.

CIRCUMSTANCES: In this policy grievance, the Union alleges the Employer has changed its expense policy without prior discussion with the Union. The Employer's position is that the changes to the expense policy do not relate to rights, benefits, privileges and working conditions, so Union involvement is not required. Furthermore, they argue the Union is estopped from challenging the changes because it did not grieve earlier failures by management to discuss changes to the expense policy.

AWARD: The grievance succeeds. The Employer clearly modified the expense policy by changing the basis on which expenses were to be recovered. The Union is to be given the opportunity to consult with management before changes are made to existing working conditions. An order has been issued restoring the old expense scheme.

AUTHORITIES: Re Religious Hospitallers of St. Joseph and Service Employees' International Union, Council 210 (1982), 7 L.A.C. (3d) 131. London and District Service Workers' Union, Local 220, S.E.I.U. v. Sisters of St. Joseph [1979] O.L.R.B. Rep. 795. Re CNCP Telecommunications (1981), 4 L.A.C. (3d) 205 at 207-8.

DECISION: 89-107

Cape Breton (Municipality of the County) AND Canadian Union of Public Employees, Local 1545

O'Connell, Charles - Chair; MacDonald, Michael; MacLeod, Lorne

Blaise MacDonald, for the Union
David Muise, for the Employer

October 31, 1989

ISSUES: Procedure - Powers of board of arbitration - Preliminary objections 3:2100; Employee - Defined - Independent contractor distinguished 5:1122; Discipline and discharge - Grounds for - Alcoholism 7:3210; Reinstatement 2:1470.

CIRCUMSTANCES: The Employer made a preliminary objection that the Grievor is not an employee but an independent contractor, since he is on a renewable annual contract. The parties made a joint submission to the Board asking for the reinstatement of the Grievor with loss of salary but without loss of seniority or benefits from the date of his termination. They ask that his employment record be cleared of any disciplinary record. Finally, the Grievor is to continue in his alcohol abuse program with time off from work to do so.

AWARD: The preliminary objection is dismissed. The Grievor is not an independent contractor because he takes instruction from the Employer. The grievance succeeds in that the Board accepted the submission of the parties in total to form the decision.

DECISION: 89-108

Sacred Heart Hospital AND Canadian Brotherhood of Railway, Transport and General Workers, Local 514

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Ken Fowlie, for the Employer

October 15, 1989

ISSUES: Working hours and shifts 5:3100; Management rights - Schedules 5:3100; Evidence - Burden of proof 3:2400; Past practice 3:4430.

CIRCUMSTANCES: The Grievor had been working a 5-day shift with Sunday and Monday off for 18 months when the Employer changed her shift to Monday through Friday with Saturday and Sunday off. The Union claims the Employer is discriminating against the Grievor by not allowing her to take her preferred days off.

AWARD: The grievance fails. The Union failed to meet the onus of proving discrimination in this situation. The Employer has acted fairly and reasonably in rescheduling the Grievor's days off.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3d ed.) at p. 3-17 [para. 3:2400]. Re Ontario Educational Communications Authority and National Association of Broadcast Employees and Technicians (1976) 11 L.A.C. (2d) p. 30. Re Algoma Ore Division, Algoma Steel Corp. and United Steelworkers, Local 3933 (1986) 27 L.A.C. (3d) p. 113.

DECISION: 89-109

Kenmount Ford Sales Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers Union, Local 506

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
George Khatter, for the Employer

October 2, 1989

ISSUES: Probationary employee 7:5000; Apprentices 7:5000 fn 12, - Wage structure 5:2420; Estoppel 2:2210, 2:2220.

CIRCUMSTANCES: The Grievor was hired as an apprentice, the Employer being unaware that he was a journeyman mechanic. The Grievor claims that he has been underpaid since being hired and seeks compensation equivalent to the mechanic's rate for all hours he has worked for the Employer, plus interest. The Employer maintains the Grievor was hired as an apprentice and signed an agreement to that effect after the Employer was made aware of his qualifications.

AWARD: The grievance fails. Regardless of his qualifications the Grievor was hired and accepted employment as an apprentice. The Union consented to this arrangement and it was only on the basis that the Grievor's employment continued through the probationary period.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (3d ed.) para. 7:5000.

DECISION: 89-110

Nova Scotia (Department of Transportation) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Susan Coen, for the Union
Jonathan Davies, for the Employer

October 3, 1989

ISSUES: Insurance and welfare plans - Calculation of benefits 8:3300, - Medical benefits and other benefits 8:3330; Interpretation - Words and phrases - Remuneration - Regular rate 8:3230; Statutory holidays - Holiday pay and other benefits - Sick leave benefits 8:3330; Intention of the parties 4:2100.

CIRCUMSTANCES: The Grievor works on a snow removal crew. Because of seasonal fluctuation, he is guaranteed to be paid for 45 hours per week of work, whether or not he actually works those hours; if he works more than 45 hours, he is paid for those hours. The Grievor went on extended sick leave, during which the Employer paid him his normal salary based on 45 hours per week of work. The Union claims the Grievor should have been paid for the hours the Grievor was actually scheduled to work, which is more than 45 hours per week. The Employer maintains that 45 hours per week is the Grievor's normal salary entitlement and that is all they are required to pay him.

AWARD: The grievance succeeds in part. The Employer's obligation to pay sick leave benefits is capped at 45 hours per week for the Grievor. The Employer is therefore not obliged to pay the Grievor for hours scheduled to be worked in excess of 45 hours per week. The Employer is additionally obliged to pay the Grievor for the paid holidays which fell during the time he was on sick leave.

AUTHORITIES: Houghton Mifflin Canadian Dictionary of the English Language (1980) at p. 1144. Random House Dictionary of the English Language, unabridged ed. 1966. Re International Association of Machinists, Lodge 1740 and John Bertram and Sons Co. Ltd. (1986), L.A.C., Vol. 17, p. 17. Re Rebmec Industries, Division of Indal Products Ltd. and United Steelworkers, Local 2729, (1973), 2 L.A.C. (2d), p. 313. Re Canvin Products Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union, Local 351 (1981), 30 L.A.C. (2d) p. 300.

DECISION: 89-111

Braemore Co-Operative Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

Cromwell, T.A. - Arbitrator

Roseanne Skoke, for the Union
R. Malcolm MacLeod, for the Employer

November 12, 1989

ISSUES: Temporary, casual and part-time employees - Wage structure 5:2420; Employee - Temporary, Casual and Part-time 5:1124; Wages - Acting pay 8:1100; Working Hours and Shifts 5:3100; Past Practice 3:4430.

CIRCUMSTANCES: The Grievor is a part-time employee who worked more than the standard twenty-four hours per week for several months while filling in for a full-time employee who was on leave. The Union claims the Employer should have paid the Grievor the full-time rate. The Employer responds that a part-time employee may be scheduled to work up to forty hours per week without attaining full-time employee status when filling in for a full-time employee who is absent from her work under some condition of the agreement or during vacation period.

AWARD: The grievance fails. The collective agreement clearly states that a full-time employee does not attain full-time employee status even when filling in for a full-time employee on an extended basis.

DECISION: 89-112

Elmco Mechanical Ltd. AND International Brotherhood of Electrical Workers, Local 625

Cromwell, T.A. - Arbitrator

n/a, for the Union
n/a, for the Employer

November 24, 1989

ISSUES: Wages - Arbitration of rates 8:1000.

CIRCUMSTANCES: The Union claims that the Employer has failed to pay four employees in accordance with the provisions of the collective agreement.

AWARD: The parties had reached agreement and the Arbitrator ordered the Employer to pay four individuals the amounts specified.

DECISION: 89-113

Northside Harbour View Hospital AND Nova Scotia Nurses Union

Archibald, Bruce P. - Chair; Larkin, Raymond F.; North, Gregory I.

Elizabeth Mullaly, for the Union
Kenneth C. Fowlie, for the Employer

November 16, 1989

ISSUES: Insurance and welfare plans - Medical benefits and other benefits 8:3330; Vacation - Computation of vacation and vacation pay - Sick 8:3330, - Other benefits 8:3250; Past practice 3:4430; Interpretation 4:2100.

CIRCUMSTANCES: The Grievor is a nurse who claims to have informed the Employer that as the result of elective surgery, she would require paid sick leave for two days previously scheduled as holidays. When she received her paycheque for that period, the two days were included as holiday pay rather than paid sick leave. The Union asks for the replacement of the holiday pay with paid sick leave for the period in question and the granting of paid holidays to be taken at another date. The Employer argues that, in accordance with normal practice, it would have granted the Grievor's request, but she failed to give proper notice.

AWARD: The grievance succeeds. The Board found that this case results from a factual misunderstanding between the parties and a lack of clarity about what constitutes notice of a desire to use sick day credits and reschedule holidays. The Employer will remove the holiday pay from the Grievor's pay period and sick pay will be substituted. The vacation days will be rescheduled at a mutually agreeable time.

DECISION: 89-114

National Construction Inc. AND International Brotherhood of Electrical Workers, Local 625

Outhouse, Bruce - Arbitrator

Ron Pink, for the Union
Karin McCaskill, for the Employer

November 29, 1989

ISSUES: Lay-off 6:2200 - Burden of proof 3:2415; Management rights 5:0000 - Fairness 4:2300; Good faith - Discriminatory discipline 7:4414; Evidence - Burden of proof - Applications - Discipline 3:2411.

CIRCUMSTANCES: The five Grievors were laid off as part of a large project coming to completion. Two of the Grievors had been involved in an earlier grievance whereby they were reinstated after the Employer dismissed them for gambling at work. The Union alleges the Employer laid off the grievors for discriminatory reasons, or rather, the Grievors were discharged under the guise of being laid off in retaliation for the previous grievance. The Union seeks an order requiring the Employer to compensate the Grievors for lost wages from the time of their layoff to the time when the second round of layoffs occurred. The Employer maintains that the Grievors were laid off as part of a series of layoffs in the normal progression of the work.

AWARD: The grievance fails. The Union has failed to demonstrate the Employer acted in bad faith. The Employer has the right to implement layoffs in the course of regular business proceedings.

AUTHORITIES: Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910 (1983), 13 L.A.C. (3d) 261 (Hope). Re Inglis Ltd. and United Steelworkers, Local 4487 (1978), 17 L.A.C. (2d) 380 (Beck). Re Ferranti-Packard Transformers Ltd. and United Steelworkers, Local 5788 (1983), 10 L.A.C. (3d) 225 (Barton). Re Toronto East General Hospital and Service Employees' Union, Local 204 (1984), 13 L.A.C. (3d) 400 (Burkett). Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141 (1981) 29 L.A.C. (2d) 202 (Burkett).

DECISION: 89-115

Pierce Fisheries Ltd. AND United Food and Commercial Workers, Local 1252, Fisherman's Union

DeMont, Eric G. - Arbitrator

Susan Coen, for the Union
Eric B. Durnford, for the Employer

December 1, 1989

ISSUES: Collective agreement - Ambiguity 3:4400; Past practice 3:4430; Interpretation - Definitions 4:2100, - Intention of the parties 4:2100, - Context 4:2300, - Expectations 4:2300; Reasonableness - Interpretation 4:2100.

CIRCUMSTANCES: The Employer operates a fleet of deep-sea scallop fishing vessels, and the Union represents the crew. After the crew has been on a fishing trip, and before the catch has been divided among the parties, the Employer makes a deduction from the total value of the catch for fuel and supplies. The Employer's deduction for fuel includes a markup over what it actually pays for the fuel. When the Union discovered this practice, they asked to be reimbursed for the difference between the price the Employer paid for fuel and the price it charges the Union. The Employer refused on the basis that this has always been its practice and the practice of other fleet owners, and that the agreement allows it to determine the deduction for fuel, following industry practice. The Union argues that the agreement does not allow for the markup in fuel.

AWARD: The grievance fails. The Employer is allowed to continue the practice followed by the industry generally and include a markup in the deduction for fuel. There is a latent ambiguity in the agreement, and the clear practice in the industry and the Employer's past practice are a reasonable approach in the circumstances.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration (3rd ed.), para. 4:2100; 4:2300. Re Easco Electric 17 L.A.C. (3d) p. 315. Re Municipality of Metropolitan Toronto 13 L.A.C. (3d) p. 58. Re Commonwealth Construction 24 L.A.C. (2d) 367 at 365, 370. International Union v. Volvo Canada 18 N.S.R. (2d) 592. Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Gale, C.J.O.). Re R.C.A. Limited 12 L.A.C. (2d) 387. Re Commonwealth Construction, 24 L.A.C. (2d) 367. Re Toronto Harbour Commissioners 3 L.A.C. (2d), 145 and 147. Re Forsythe 17 L.A.C. (2d) 257.

DECISION: 89-116

National Sea Products AND National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW - Canada)

MacLellan, J.A. - Arbitrator

Larry Wark, for the Union
John Plowman, for the Employer

December 15, 1989

ISSUES: Seniority 6:0000 - Applications - Lay-off 6:2200; Skill and ability - Arbitral review - Senior employee with required ability 6:3210, - Burden of proof 3:2413, 6:3200.

CIRCUMSTANCES: The Grievor was laid off from his position as a fueler/water attendant after five and one-half years of employment. Along with these duties, he had also been helping out as a netmaker on a part-time basis. The Employer had hired a full-time netmaker who had only six months seniority at the time of the Grievor's layoff. The Grievor argues that he has the required skill and ability for the netmaker position, and therefore he should be reinstated in that position. The Employer argues that the Grievor does not have the skill and ability to do the netmaker job and they are therefore not obligated to replace the Grievor in that position.

AWARD: The grievance fails. The onus is on the Grievor to prove that he has the necessary skill and ability to perform the netmaker's duties. Evidence indicated that the Grievor would not be able to reasonably do all the job functions of the netmaker. The Employer is not obligated to place the Grievor in the netmaker position.

AUTHORITIES: Brown and Beatty. Canadian Labour Arbitration (3rd ed.) p. 6-1 [para. 6:0000]; p. 6-43, 6-44 [para. 6:3210].

DECISION: 89-117

Halifax (Municipality of the County) AND International Assn. of Fire Fighters, Local 2527

Outhouse, Bruce - Arbitrator

Brian Johnston, Carol Reardon, for the Union
Greg North, for the Employer

December 11, 1989

ISSUES: Work assignment - Contracting out - Employees outside unit 5:1400; Working hours and shifts 5:3100; Overtime - Distribution of overtime - Persons normally performing 5:3222; Management rights 5:0000; Intention of the parties 4:2100; Employee - Defined 5:1122; Interpretation - Aids to interpretation - Dictionaries 4:2210.

CIRCUMSTANCES: The Employer operates a fire department with union employees as fire fighters and non-union voluntary fire fighters. When on duty, the fire fighters are the duty platoon; each duty platoon has a duty volunteer platoon assigned to it. One evening per week the duty and duty volunteer platoons participate in a joint training programme. The fire station is manned by another volunteer platoon. The Union contends the Employer should call in its members to staff the station, paying them time and a half for four hours, rather than using volunteers. They argue the collective agreement allows volunteers to replace union members only in emergency situations. The Employer argues the collective agreement does not restrict the use of volunteers in this manner.

AWARD: The grievance fails. The Union's assertion that its members have the exclusive right to perform bargaining unit work unless there is a fire or other emergency is not sustained in the agreement. In addition, the volunteer platoon is not "replacing" the duty platoon because the duty platoon is on active duty, albeit in a training session.

AUTHORITIES: Webster's New World Dictionary (2nd ed.). The Shorter Oxford English Dictionary (3rd., Vol. II). Black's Law Dictionary (5th ed.). Brown and Beatty, Canadian Labour Arbitration (3rd ed.) at p. 4-25, [para. 4:2100]. Re Dominion Stores Limited (1978), 20 L.A.C. (2d) 118. Re Nova Scotia Civil Service Commission and the Nova Scotia Government Employees Association (Christie award) January 4, 1982. Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union (1986), 25 L.A.C. (3d) 5 (Outhouse).

DECISION: 89-118

Hermes Electronics Ltd. AND International Brotherhood of Electrical Workers, Local 1651

North, Gregory I. - Chair; Dobbin, Barney; McDougall, Donald H.

Ronald A. Pink, for the Union
Peter MacLellan, for the Employer

November 16, 1989

ISSUES: Absenteeism 7:3112 - Control program 4:2310; Medical examinations 7:3230; Management rights 5:0000; Collective agreement - Matters arising outside of 2:1200.

CIRCUMSTANCES: The Employer instituted a program to address an ongoing problem with absenteeism in its workforce. An investigation revealed a number of employees who had high levels of absenteeism. These employees were directed by letter to see their own physicians and obtain an opinion regarding their absences from work and expectations regarding their attendance in the future. In addition, these employees were required to meet with one of two doctors selected by the Employer to ascertain future prospects of attendance. The Union argues that unless there is a specific provision in the agreement giving the Employer the right to direct employees to undergo such medical examinations, they are not entitled to impose such a requirement. The Employer maintains that it is a management right to require a medical examination by a doctor of the Employer's choice in order to assess an employee's fitness to continue work on a regular basis.

AWARD: The grievance succeeds. The agreement specifies under which circumstances the Employer is permitted to direct medical examinations, and absenteeism is not included in the clause. The grievors have already submitted to an examination by the Employer's appointed doctor and the Employer is still awaiting a report of those examinations. The Employer is directed to contact the doctor and direct that no report be forwarded arising out of the medical examinations of the grievors.

DISSENT: McDougall would dismiss the grievance and allow the Employer to receive the doctor's reports on the grievors. Despite the fact the particular circumstances are not outlined in the collective agreement, the inherent rights of management allow the ordering of examination under reasonable circumstances such as these.

AUTHORITIES: Re Braemore Home (1988), 34 L.A.C. (3d) 271 at pp. 281-282. Nova Scotia Nurses Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital (1982) 54 N.S.R. (2d) 289. Re Good People Sea and Shore Services Ltd. and Canadian Brotherhood of Railway Workers, Local L.C. 113 (1973), 3 L.A.C. (3d) 12. U.A.W.

Local 525 and Studebaker - Packard of Canada Ltd. (1960), 11 L.A.C. 139 (Cross). U.A.W. Local 89, and Reflex Corp. of Canada Automotive Canada Ltd. (Weatherall), referred to in re U.A.W. Local 27 and Eaton Automotive Canada Ltd. (1969), 20 L.A.C. 218 at p. 220. Dominion Textiles v. United Textile Workers of America, Local 152 R. Lorne MacDougall, Chair, October 8, 1982. Re Inco Ltd. and United Steel Workers (1988) 35 L.A.C. (3d) 108, at p. 111-112.

DECISION: 89-119

Robert Hirtle Construction (1985) Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 83

DeMont, Eric G. - Arbitrator

Gordon Forsythe, for the Union
Robert Hirtle, for the Employer

December 19, 1989

ISSUES: Union - Recognition 9:1100; Bargaining unit - Work assignment 5:1200; Work assignment - Contracting out - Employees outside unit 5:1400.

CIRCUMSTANCES: The Union alleges the Employer employed non-union carpenters in a construction project, depriving union carpenters of wages and benefits. The Employer agreed that he employed non-union carpenters on that job but added that he had hired union employees in non-union positions, which should off-set the damage claim of the Union.

AWARD: The grievance succeeds. The Employer is ordered to pay the four union carpenters the amount lost when the work was performed by non-union members. There is no authority to reduce the claim for damages by the amount paid to union members for performing non-union work.

AUTHORITIES: Re Blouin Drywall 57 D.L.R. (3d) 199.

DECISION: 89-120

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine and Shipbuilding Workers of Canada, Local No. 1

Kydd, William H. - Arbitrator

n/a, for the Union
n/a, for the Employer

December 13, 1989

ISSUES: Seniority - Applications - Promotion, demotion and transfer 6:2100, - Vacancy 5:2510, - Burden of proof 3:2415; Remedies - Type of grievance - Promotion 6:4100.

CIRCUMSTANCES: Grievor A filed a grievance alleging the Employer had breached the collective agreement by awarding the position of maintenance mechanic to Grievor B. The Employer subsequently agreed it had erred and awarded the position to Grievor A. Grievor B then grieved that his loss of the position constituted a breach of the agreement. Grievor B argues that although he has less seniority than Grievor A, he is better qualified for the position. The Employer advised the Union it had no objection to either Grievor A or B being awarded the position, and would therefore take a neutral position on the grievance.

AWARD: The grievance of Grievor B fails. The qualifications, job-related abilities and experiences of the two Grievors are relatively equal. The seniority of Grievor A therefore allows the position to be awarded to him.

AUTHORITIES: Re U.A.W. and Westeel Products Ltd. (1960), 11 L.A.C. 199 at p. 199. Re Textile Workers Union and Lady Galt Towers (1969), 20 L.A.C. 382. Re Century Electronics Ltd. and Canadian Association of Industrial Mechanics & Allied Workers (1978), 19 L.A.C. (2d) 105. Re Northern Telecom Ltd. and U.A.W. Local 1839 (1980), 25 L.A.C. (2d) 379. Re British Columbia Housing Management Commission and Service Employees International Union, Local 224 (1977) 15 L.A.C. (2d) 121 (Weiler) at p. 128. Kysor of Ridgetown (1967) 18 L.A.C. 382, at p. 389. Re Canadian Brotherhood of Railway Transport and General Workers and St. Lawrence Seaway Authority (1969), 23 L.A.C. 156 (Weiler) at p. 159. Re Wellesley Hospital and Ontario Nurses Association (1989), 5 L.A.C. (4th) 55.

DECISION: 89-121

Metropolitan Authority (Halifax, Dartmouth and Halifax County) AND
Amalgamated Transit Union, Local 508

Cotter, Brent W. - Arbitrator

Kim Turner, for the Union
Amery Boyer, for the Employer

December 22, 1989

ISSUES: Vacation - Computation of vacation and vacation pay 8:3230; Collective agreement - Ambiguity 3:4400; Negotiating history 3:4420; Past practice 3:4430 ; Time-limits - Restriction on arbitrability 2:1100.

CIRCUMSTANCES: The Union claims certain employees are entitled to receive 8 hours pay for days designated in the collective agreement as holidays, rather than the 7 hours pay they currently receive. They ask that those employees be reimbursed all wages and benefits lost to them retroactive to the signing of the collective agreement. The Employer argues that employees in dispute work a 35-hour week so a holiday consists of 7 hours, and past practice has been to pay them as such.

AWARD: The grievance succeeds in part. The Employer's argument that the negotiating history of the agreement indicated these employees should be paid for 7 hours is not applicable because there is no ambiguity in the agreement. The employees in question are entitled to receive 8 hours pay for the holidays designated in the agreement. The grievance can only apply to violations which have occurred with the 30-day limitation period of the grievance as set out in the agreement. The Union's claim for a remedy retroactive to the signing of the agreement is denied. Therefore, the Employer should be expected to compensate the employees in question for the holiday pay entitlements which have occurred since the filing of the grievance.

AUTHORITIES: Re Steinberg Inc. and United Food and Chemical Workers, Local 486 (1987), 26 L.A.C. (3d) 135 (Fraser). Brown and Beatty, Canadian Labour Arbitration (3d ed.) 1988, p. 3-43 [para.3:4400, fn.3]; p. 2-46 [para.2:2220]. Re Canadian Brotherhood of Railway, Transport and General Workers and St. Lawrence Seaway Authority (1968), 19 L.A.C. 74 (Christie). Re North York Township Civic Employees Union and Township of North York (1962), 12 L.A.C. 233 (Bennett). Re Canadian General Electric Co. Ltd. and United Electrical, Radio and Machine Workers, Local 537 (1971), 22 L.A.C. 149, at pp. 150-1. Re Vancouver Police Board and Vancouver Police Union (1988), 32 L.A.C. (3d) 215 (Hope). Re Port Colborne General Hospital and Ontario Nurses' Association (1986), 23 L.A.C. (3d) 323 at p. 327-8. Re St. Raphael's Nursing Homes Ltd. and London and District Service Workers' Union, Local 220 (1985); 18 L.A.C. (3d) 430 (Roberts). Union Gas Co. of Canada Ltd. and International

Chemical Workers, Local 741 (1972), 2 L.A.C. (2d) 45 (Weatherill). Re U.S.W. Local 7105 and Automatic Screw Machine Products Ltd. (1972), 23 L.A.C. 396 (Johnston). Re U.A.W. and National Auto Radiator Manufacturing Co. (1967), 18 L.A.C. 326 (Palmer).

DECISION: 89-122

Seaport Contractors Ltd. AND International Union of Operating Engineers, Local 721

Kydd, William H. - Arbitrator

Raymond Larkin, for the Union
Eric Durnford, for the Employer

October 17, 1989

ISSUES: Job clasifications and descriptions - Bargaining union work defined by 5:1200, - Creation or revision - Burden of proof 3:2414; Interpretation - Words and phrases - Jobs and classifications - Classifications 5:2000 fn 12.

CIRCUMSTANCES: The Union argues that certain work carried out by the Employer at Halifax International Airport falls within the industrial commercial sector as governed by the agreement between the Union and the Construction Management Labour Bureau. The wages paid to the employees should be as set out in that agreement. The Employer contends the work did not fall within the industrial and commercial sector and was therefore not subject to the agreement between the Employer and the Union.

AWARD: The grievance fails. The Union has failed to discharge the onus of establishing that the work in question falls within the commercial and industrial sector.

AUTHORITIES: Labours International Union of North America, Local 615 and Seaport Contractors Limited (Labour Relations Board) (Outhouse, July 13, 1981). U.A.W. v Volvo Canada Ltd. (1977) 18 N.S.R. (2d) 592 at p. 610, 611. Leitch Gold Mines Limited v. Texas Gulf Sulphur Company [1969] 1 O.R. 469 at p. 523-4. Re Teamsters Union and Motor Transport Industrial Relations Board of Ontario (1969), 22 L.A.C. 57. Turner, Estoppel by Representation (3d), p. 139. Chalmers v. Pardoe [1963] 3 All E.R. 552 (HL). Mackenzie v. Morris Taxi Company Limited [1938] 2 D.L.R. 193. Algonquin College (1985), 19 L.A.C. (3d) 81. Culliton Bros. Ltd. [1982] O.L.R.P. 357. Brown and Beatty, Canadian Labour Arbitration (3d ed.) para. 1:3000. International Union of Operating Engineers, Local 721 and Municipal Spray and Contracting (McLellan, Arbitrator) (August 1, 1985). International Union of

Operating Engineers, Local 721 and Standard Paving Maritimes Limited (McLellan, J.) (June 29, 1988). United Brotherhood of Carpenters and Joiners of Amercia, Local 1588 and Municipal Ready Mix Limited (April 20, 1989).

DECISION: 89-123

Digby General Hospital (Board of Management) AND Nova Scotia Nurses' Union

DeMont, Eric G. - Chair; MacDougall, Donald H. Larkin, Raymond F.

Elizabeth Mullaly, for the Union
Kenneth C. Fowlie, for the Employer

December 7, 1989

ISSUES: Promotion, demotion and transfer - Seniority 6:2000; Skill and ability - Arbitral review - Senior employee if relatively equal 6:3220; Management rights 5:0000; Evidence - Exclusionary rules - Hearsay 3:4310.

CIRCUMSTANCES: The Grievor is a nurse who applied for, but was not awarded, a temporary position as Head Nurse. The Union alleges the Employer did not give primary consideration to fitness, ability, and qualifications when granting the position to the successful candidate who had greater seniority than the Grievor. The Employer argues that the position was only a temporary upgrading and could be awarded as a management decision.

AWARD: The grievance fails. The Employer has the authority to grant the position to the successful candidate so she can gain administrative experience. However, the Majority was not prepared to state that it would be appropriate for the position to be awarded on this same basis if the vacancy were permanent.

DISSENT: Larkin agrees with the decision, but argues that the temporary nature of the position should not be a factor in the selection process. In addition, he is concerned that the selection committee was influenced by opinions about the Grievor's character that should have been irrelevant.

AUTHORITIES: Sutherland-Harris Memorial Hospital (MacDougall) (May 1985).

DECISION: 89-124

Truro (Town) AND Canadian Union of Public Employees, Local 734

MacDonald, David J. - Chair; Durnford, Eric; Tynes, Michael

Diane Bourque, for the Union
David W. Gruchy, for the Employer

November 20, 1989

ISSUES: Discipline and discharge - Grounds for - Absence from work - Innocent distinguished 7:3200; Innocent absenteeism 7:3210; Illness or disability - Burden of proof - Employer allegations 7:3250, - Proof of recovery 8:3342.

CIRCUMSTANCES: The Grievor is a labourer who, over a ten-year work period, has missed extended periods of work due to illness. He had received several written warnings, after which his attendance rate temporarily improved. After a final extended absence, the Grievor returned to work and was informed his employment had been terminated due to his excessive innocent absenteeism. The Union argues the Grievor has now had his illness properly diagnosed and that his attendance will improve.

AWARD: The grievance succeeds in part. The Grievor has met the onus of showing his attendance will improve in the future. However, the Employer is entitled to expect regular attendance and the Grievor must now fulfill these expectations. The Grievor will be conditionally reinstated to his former job with full seniority but without compensation or benefits. The Grievor's continuing employment will be conditional for 18 months, during which time he must attain an attendance record equal or better than the others in his department. Failure to do so will be deemed cause for dismissal and a breach of his conditional reinstatement.

AUTHORITIES: Nova Scotia Government Employees Association and the Civil Service Commission (Clarke, Arbitrator).

DECISION: 89-125

Maritime Telegraph and Telephone Co. Ltd. AND Atlantic Communication and Technical Workers' Union

Cotter, Brent W. - Arbitrator

Ronald Pink, for the Union
Michael Dunphy, for the Employer

November 20, 1989

ISSUES: Procedure - Powers of board of arbitration - Preliminary objections 3:2100; Arbitrability - Statutory requirement 2:1100, - Matters Arising Outside of Agreement 2:1200; Probationary employee - Right to grieve 7:5000, - Discipline - Arbitrability 2:1100; Intention of the parties 4:2100; Collective agreement - Matters arising outside of 2:1200 ; Evidence - Admissibility - Rules of evidence 3:4100.

CIRCUMSTANCES: The Grievor is a probationary employee who was terminated on the last day of his probation period. The Employer raised the preliminary objection that this is not grievable because the collective agreement does not allow probationary employees to contest dismissal. The Union argues that the collective agreement does not allow probationary employees to contest dismissal. The Union argues that the collective agreement is overridden by the Trade Union Act which requires all differences to be subject to a final settlement provision. The Union asks that the Grievor be reinstated, possibly in another department.

AWARD: The preliminary objection of the Employer is dismissed. Where the collective agreement is silent on the question of the dismissal of probationary employees, the existence of some employee right establishes that a difference exists, or may exist. The existence of this difference allows the arbitrator jurisdiction to hear the grievance. There is an additional decision in favour of the Employer allowing the admissibility of the evidence of four witnesses.

AUTHORITIES: Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al (1983), 147 D.L.R. (3d) 210. International Association of Firefighters, Local 268, v. City of Halifax (1982), 131 D.L.R. (3d) 426. Re Motor Employees (Windsor) Credit Union and United Auto Workers, Local 240 (1983), 7 L.A.C. (3d) 35 (Gorsky). Re Hamilton-Wentworth Regional Board of Commissioners of Police and Hamilton-Wentworth Police Association (1980), 24 L.A.C. (2d) 191 (Abbott). Re H & S Reliance Ltd. and Graphic Arts International Union, Local 211 (1983), 8 L.A.C. (3d) 313 (McLaren). Re National Arts Centre Corporation and Public Service Alliance of Canada (1981), 28 L.A.C. (2d) 79 (Weatherhill). Re Ottawa Citizen and Ottawa Newspaper Guild, Local 205 (1979), 22 L.A.C. (2d) 307 (Owen). Re Pacific Western Airlines Ltd. and Canadian Airline Flight Attendants Association (1981), 30 L.A.C.

(2d) 68. Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill and Smelter Workers' Union, Local 598 (1982) 1 L.A.C. (3d) 158 (Picher). Re City of Halifax and International Association of Firefighters Local 268 (1982), 6 L.A.C. (3d) 240 (Outhouse). Re Vancouver Island Regional Library Board and Canadian Union of Public Employees, Local 401 (1983), 10 L.A.C. (3d) 164 (Vickers). Re Gregory Manufacturing Ltd. Specialty Products Division and International Woodworkers of America, Local 1-357 (1985), 18 L.A.C. (3d) 71 (Vickers). Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union (unreported, decision dated February 13, 1989 (Cotter). Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1 (1980), 111 D.L.R. (3d) 693. Re the Queen in Right of New Brunswick and Leeming et al (9181), 118 D.L.R. (3d) 202.

DECISION: 89-126

No decision assigned to this number.

DECISION: 89-127

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, W. Brent - Arbitrator

Turner, Kimberley, for the Union
Davies, Jonathan, for the Employer

May 19, 1989

ISSUES: Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000; Settlements 2:3230.

CIRCUMSTANCES: The grievor was disciplined by the employer through the imposition of a 1½ day suspension without pay; prior to formal arbitration, the parties agreed on terms to resolve the dispute.

AWARD: The grievance succeeds in part; where both parties agree discipline was merited in the circumstances, the suspension period is reduced to ½ day and the employer will compensate the grievor for 1½ days pay.

DECISION: 89-128

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Pink, Ronald, for the Union
Davies, Jonathan, for the Employer

August 4, 1989

ISSUES: Interpretation - Canons of construction 4:2100, - Intention of the parties 4:2100; Insurance and welfare plans - Entitlement to benefits 8:3320.

CIRCUMSTANCES: The grievor, a housekeeper's aide with a record of excused time for chronic back pain, suffered a back injury while on duty. While on injury on duty [IOD] leave which exceeded the maximum of 100 days under the agreement, the grievor's application for short term illness leave [STIL] was denied. The employer claimed that STIL benefits were used during the grievor's IOD absence and that contract provisions on long term disability applied.

AWARD: The grievance succeeds; in the absence of contract language permitting the employer to deduct an employee's IOD leave from her STIL entitlement, injury on duty leave provisions are separate and distinct from sick leave provisions of the agreement. The employer is directed to pay the grievor the difference between what she received for the first 100 working days of long term disability and the amount she would have received had she been been granted STIL. Jurisdiction is retained to fix exact compensation if the parties cannot agree.

AUTHORITIES: Workers' Compensation Act, R.S.N.S. 1967, c. 343, as amended.

DECISION: 89-129

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Darby, Peter E. - Arbitrator

Raymond F. Larkin, for the Union
William Wilson, for the Employer

August 22, 1989

ISSUES: Theft 7:3310, Penalty 7:3314; Reinstatement 2:1470; Disciplinary penalties - Mitigating factors 7:4400, Rehabilitative potential 7:4422, - Reasonableness 7:4300; Discipline and discharge - Grounds for - Theft 7:3310, 7:3314.

CIRCUMSTANCES: The grievor was employed in a position of trust as a nightwatchperson. Following the grievor's criminal conviction for theft of employer's property (a wooden picnic table) the grievor was discharged from employment. The employer claims that where employees act in positions of trust, discharge from employment is justified for theft. The grievor alleges that while the employer had just and sufficient cause for such discharge, the penalty is too severe and ought to have substituted a lesser penalty of suspension.

AWARD: The grievance succeeds; in the absence of a specific penalty in the agreement for theft, and based on mitigating circumstances and the high rehabilitative potential of the grievor, the penalty of discharge is recinded and substituted with a penalty of suspension without pay or other benefits until date of the award, at which time, if not sooner, the employer shall have reinstated the grievor.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (3rd ed.), pp 7:64-65 (para. 7:3310), 7:152-154 (para. 7:4314), 7:160-161 (para. 7:4422). Re Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979), 23 L.A.C. (2d) 227 (Arthurs). Civil Service Collective Bargaining Act, S.N.S. 1978, C.3, s. 38 (4). Steel Co. Ltd. (1964), 14 L.A.C. 356 (Reveille). Wm. Scott & Co. Ltd., [1977] 1 Can. L.R.B.R. 1 (Weiler).

DECISION: 89-130

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, W. Brent (Chair); Durnford, Eric; Wolfe, Gwen

Kim Turner, for the Union
Jonathan Davies, for the Employer

November 9, 1989

ISSUES: Interpretation - Canons of construction 4:2100, - Intention of the parties 4:2100, - Aids to interpretation - Prior awards and court decisions 4:2220; Insurance and welfare plans - Entitlement to benefits 4:2100, 8:3320; Pregnancy - Medical benefits 8:3320.

CIRCUMSTANCES: The grievor went on sick leave following medical diagnosis for hypertension and high risk pregnancy involving twins, for the intervening period between her diagnosis and her delivery date. The employer granted sick leave for only part of this period, and determined that the grievor would begin her maternity leave for the remainder of her absence from work, approximately 11 weeks prior to her delivery date. The grievor claims right to sick leave for the full period from the beginning of her sick leave until her delivery date.

AWARD: The grievance succeeds. Where the grievor's illness was a pregnancy related illness arising prior to the commencement of her maternity leave, she is entitled under the agreement to claim, and to be compensated for, sick leave benefits. The majority opinion is that where two articles of the agreement conflict, the more specific article should be preferred over the more general. Authority is reserved to deal with quantum of compensation if the parties cannot agree.

DISSENT: (Durnford) The grievance should fail. The grievor has not established that the employer breached terms of the agreement. Where articles of an agreement appear to be in conflict, arbitrators should construct an interpretation which harmonizes their meaning and gives a reasonable interpretation.

AUTHORITIES: Re Halifax Infirmary Hospital and Nova Scotia Nurses' Union (1983), 6 L.A.C. 93d) 153 (MacDougall), aff'd (1982) 49 N.S.R. 92d) 98 (N.S.S.C.). Re Board of Governors of Dalhousie College and University and Dalhousie Staff Association (MacLellan, unreported, June 3, 1988). Re Tas Communication Services Ltd. (1972), 24 L.A.C. 389. Re United Automobile Workers, Local 177 and Brantford Trailer and Body Ltd. (1968), 18 L.A.C. 357 (Hanrahan). Brooks et al. V. Canada Safeway Ltd. [1989] 1 S.C.R. 1219. Nova Scotia Human Rights Act.

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